No. 03-1238

Title:	IBP, Inc., Petitioner v. Gabriel Alvarez, Individually and on Behalf of All Others Similarly Situated, et al.
Docketed:	March 3, 2004
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(02-35042, 02-35110)
Decision Date:	August 5, 2003
Rehearing Denied:	November 28, 2003

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 26 2004	Petition for a writ of certiorari filed. (Response due April 2, 2004)
Apr 2 2004	Motion for leave to file amici brief filed by National Chicken Council, et al.
Apr 2 2004	Brief of respondents Gabriel Alvarez, Individually and on Behalf of All Others Similarly Situated, et al. in opposition filed.
Apr 13 2004	Reply of petitioner IBP, Inc. filed. (Distributed)
Apr 14 2004	DISTRIBUTED for Conference of April 30, 2004.
May 3 2004	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Oct 25 2004	Brief amicus curiae of United States filed.
Nov 2 2004	Supplemental brief of petitioner IBP, Inc. filed. (Distributed)
Nov 9 2004	DISTRIBUTED for Conference of November 24, 2004.
Nov 10 2004	Supplemental brief of respondents Gabriel Alvarez, et al. filed. (Distributed)
Jan 18 2005	DISTRIBUTED for Conference of February 18, 2005.
Feb 22 2005	Motion for leave to file amicus brief filed by National Chicken Council, et al. GRANTED.
Feb 22 2005	Petition GRANTED imited to Question 1 presented by the petition. The case is consolidated with No. 04-66 and a total of one hour is allotted for oral argument.
Mar 25 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 9, 2005. VIDED.
May 2 2005	Further extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including May 16, 2005. VIDED
May 16 2005	Joint appendix filed.
May 16 2005	Brief of petitioner IBP, Inc. filed.
May 17 2005	Brief amicus curiae of AFL-CIO filed. VIDED.

May 23 2005	Extension of time within which to file respondents' briefs on the merits to and including July 13, 2005. VIDED
Jul 8 2005	Further extension of time within which to file respondents' brief on the merits to and including August 1, 2005.
Jul 20 2005	CIRCULATED.
Jul 20 2005	SET FOR ARGUMENT on Monday, October 3, 2005.
Jul 29 2005	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Aug 1 2005	Brief amicus curiae of United States filed. (Distributed)
Aug 1 2005	Brief of respondents Gabriel Alvarez, Individually and on Behalf of All Others Similarly Situated, et al. filed. (Distributed)
Aug 9 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED
Aug 15 2005	Motion for divided argument filed by respondents Alvarez, et al. VIDED
Aug 15 2005	Motion for divided argument filed by IBP, Inc. and Barber Foods, Inc. (VIDED)
Sep 1 2005	Record received from U.S.D.C. for Districr Fo Washington (Spokane). (9 boxes)
Sep 2 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 2 2005	Motion for divided argument filed by IBP, Inc. and Barber Foods, Inc. DENIED.
Sep 2 2005	Motion for divided argument filed by respondents Alvarez, et al. DENIED.
Sep 6 2005	Reply of petitioner IBP, Inc. filed. (Distributed)
Oct 3 2005	Argued. For petitioner in 03-1238 and respondent in 04-66: Carter G. Phillips, Washington, D.C. For respondents in 03-1238 and petitioners in 04-66: Thomas C. Goldstein, Washington, D.C.; and Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 26, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

Section 4(a) of the Portal-to-Portal Act of 1947 provides an exception to an employer's obligation to pay wages under the Fair Labor Standards Act of 1938 ("FLSA"), for time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" and for "activities which are preliminary or postliminary to said principal activity." 29 U.S.C. § 254(a). Section 3(*o*) of the FLSA expressly excludes from payment "any time spent in changing clothes . . . at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." *Id.* § 203(*o*).

The questions presented are:

(1) Whether walking that occurs between compensable clothes-changing time and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking . . . to and from the actual place of performance of the principal activity" within the meaning of Section 4(a).

(2) Whether, after *United States* v. *Mead*, 533 U.S. 218 (2001), deference is due the Department of Labor's interpretation of the term "clothes" in Section 3(*o*), when that interpretation is embodied in an opinion letter issued by the Administrator of the Department's Wage and Hour Division, who is charged with administering and enforcing the FLSA, when Congress has provided that third parties may rely on such opinion letters, and when the opinion letter itself restores the agency's prior position?

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption. Petitioner notes that IBP, inc., is currently known as Tyson Fresh Meats, Inc.

Pursuant to Supreme Court Rule 29.6, petitioner states that IBP, inc., currently known as Tyson Fresh Meats, Inc., is a subsidiary of Tyson Foods, Inc. (NYSE: TSN).

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IN THE

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No. 03-

IBP, INC.,

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GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner IBP, inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying IBP's petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003, is unreported, and is reprinted in the Appendix to this Petition ("Pet. App.") at 83a-84a. The underlying opinion of the court of appeals was entered on August 5, 2003, is reported at 339 F.3d 894 (9th Cir. 2003), and is reprinted in the Pet. App. at 1a-34a. The findings of

fact and conclusions of law of the United States District Court for the Eastern District of Washington were entered on September 14, 2001, are unreported, and are reprinted in the Pet. App. at 35a-82a.

JURISDICTION

The opinion of the court of appeals was entered on August 5, 2003, and the order of the court of appeals denying IBP's petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition involves the following provisions of the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947: 29 U.S.C. §§ 203(*o*), 204(a), 251, 254(a), 259; see also 29 C.F.R. §§ 790.1(b), 790.6(b), 790.7(c)-(g), 790.17(d), 1910.1030(b). The pertinent text of these provisions is set forth in the Pet. App. at 85a-93a.

STATEMENT OF THE CASE

As the Secretary of Labor explained in her *amicus* brief to the Ninth Circuit below, this case presents fundamental questions concerning the compensability of certain pre- and post-shift activities under the Fair Labor Standards Act of 1938 ("FLSA") and the Portal-to-Portal Act of 1947 ("Portal Act").

First, the Ninth Circuit ruled that Section 4(a) of the Portal Act, which excludes from compensation the time employees spend "walking . . . to and from" their actual work stations, does not apply to such walking if it occurs between compensable clothes-changing time and the actual work station. In so ruling, the Ninth Circuit created a square conflict with the First and Tenth Circuits, which reached precisely the opposite conclusion on this important issue. See Pet. App. 19a (acknowledging contrary interpretation of the First Circuit). Second, the Ninth Circuit ruled that certain

attire worn in the meat packing industry does not constitute "clothes" within the meaning of Section 3(*o*) of the FLSA, which excludes from compensation "any time spent changing clothes . . . at the beginning or end of each workday" in unionized facilities in certain circumstances. In so ruling, the Ninth Circuit ignored a contrary decision of the Fifth Circuit, and refused to afford either *Chevron* or even *Skidmore* deference to an opinion letter in which the Department of Labor concluded that the items of attire in question are "clothes" under Section 3(*o*). See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The decision below thus adds to the widespread confusion in the lower courts concerning (a) when agency pronouncements that are not the product of notice-and-comment rulemaking or formal agency adjudications are legally binding and (b) the degree of deference that attaches to non-binding agency pronouncements. Accordingly, this case provides the Court an opportunity to supply much needed guidance on these critical and frequently recurring questions of administrative law.

A. The Fair Labor Standards Act, the Portal-to-Portal Act, and the Department of Labor

Some familiarity with the FLSA and the Portal Act, as well as the Department of Labor's role in administering those statutes, is necessary to place the questions presented in their proper context. In 1938, Congress enacted the FLSA to establish, *inter alia*, employment compensation standards. See 29 U.S.C. §§ 202, 206, 207. That Act requires employers to "record, credit, and compensate employees for all of the time which the employer requires or permits employees to work." *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 5 (1st Cir. 2003) (citing 29 U.S.C. § 201 *et seq.*), *pet. for reh'g and reh'g en banc filed*, Nos. 02-1679, -1739 (1st Cir. June 17, 2003), *briefing ordered*, Nos. 02-1679, -1739 (1st Cir. June 26, 2003 and Aug. 18, 2003). Work is generally defined as "physical or mental exertion (whether burdensome or not)

controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Employers who violate the FLSA's requirements may face liability and liquidated damages. See 29 U.S.C. § 216(b).

In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), this Court adopted a broad interpretation of the compensation due employees with respect to certain collateral work activities. In particular, the Court held that pottery plant employees were entitled to compensation for the "30 seconds" to "8 minutes" of walking time from the plant entrance to their work stations as well as for "various preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, [and] putting on finger cots." *Id.* at 682-83, 690. In the wake of *Anderson*, there was a "vast flood of litigation" involving "vast alleged liability." 93 Cong. Rec. 2087, 2089 (1947); *id.* at 2082 (noting the "immensity of the [litigation] problem").

Congress responded to *Anderson* and the litigation it spawned by enacting the Portal Act. As this Court has recognized, the Portal Act "was designed primarily to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* . . . would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956) (citation omitted) (quoting 29 U.S.C. § 251(a)). Congress identified a litany of harms that can attend uncertainty and overbreadth in the area of employee compensation for "walking time," including: financial ruin for employers, gross inequity of competitive conditions, and windfall payments to employees. 29 U.S.C. § 251(a). Congress enacted the Portal Act (1) to "relieve" these pressures, (2) to "protect the right of collective bargaining," and (3) "to define and limit the jurisdiction of the courts." *Id.* § 251(b).

This case raises issues that implicate provisions of the FLSA and the Portal Act. First, Section 4 of the Portal Act excludes certain "walking time" from the FLSA's compensation requirements. Section 4 provides that:

> no employer shall be subject to liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay . . . for . . .
>
> > (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Id. § 254(a).

Second, in 1949, Congress added Section 3(*o*) to the FLSA, which provides:

> [i]n determining . . . the hours for which an employee is employed, there shall be excluded any time spent in *changing clothes* . . . at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Id. § 203(*o*) (emphasis added).

Congress also created the Department's Wage and Hour Division. The Administrator of the Division, who is "appointed by the President, by and with the advice and consent of the Senate," *id.* § 204(a), is charged with the

"administration and enforcement" of the FLSA, 29 C.F.R. § 790.1(b).[1] Under the FLSA, "any written administrative regulation, order, ruling,[2] approval, or interpretation" by the Administrator may be relied on by third parties as a good-faith defense against FLSA liability. 29 U.S.C. § 259.

B. Factual Background

1. IBP, inc., currently known as Tyson Fresh Meats, Inc. (referred to herein as "IBP"), is the world's largest supplier of premium beef and pork, and related products. See Pet. App. 2a. Headquartered in Dakota Dunes, South Dakota, IBP employs approximately 41,000 people. Respondents are unionized production workers at IBP's Pasco, Washington meat processing facility.

Production workers are required to wear various items, which they must don prior to arriving at their work stations. These items include a sanitary outer garment, a plastic hardhat, a hair net, ear plugs, a face shield, goggles, gloves, liquid-repelling sleeves, apron and leggings, safety boots or shoes, and a weight belt. See Pet. App. 3a-4a & n.2, 39a-40a. Moreover, "knife users" may wear additional items such as mesh metal aprons, leggings, vests, sleeves, and gloves, as well as plexiglass arm guards and Kevlar gloves. See *id.* at 4a n.2, 39a-40a. Although, for a time, collective-bargaining agreements governing IBP's employees expressly included compensation for "clothes changing" time at the beginning and end of the shift, the agreements negotiated in 1982, 1986, and 1992, as well as the current agreement, exclude "clothes

[1] In its 1949 FLSA amendments, Congress also ratified any then-effective "'order, regulation, or interpretation of the Administrator,'" unless inconsistent with the FLSA, until modified by the Administrator. *Steiner* v. *Mitchell*, 350 U.S. 247, 255 n.8 (1956) (quoting 29 U.S.C. § 208 note).

[2] "The term 'ruling' commonly refers to an interpretation made by an agency 'as a consequence of individual requests for rulings upon particular questions,'" *i.e.*, "[o]pinion letters." 29 C.F.R. § 790.17(d).

changing time." *Id.* at 4a n.3, 37a-38a. Employees must be at their work station on the production line at the time the first product arrives at their station. See *id.* at 3a.

2. In 1999, respondents filed a class action suit against IBP in the United States District Court for the Eastern District of Washington charging that certain of IBP's compensation practices violated the Portal Act and FLSA. First, respondents sought pay for time spent walking to their Pasco plant work stations after donning their work attire before the beginning of the work shifts, and time spent walking from their work stations before doffing that attire after the end of the work shifts. See 29 U.S.C. § 254(a). Second, respondents sought pay for the time spent actually donning and doffing their attire. Petitioner defended its practices on the grounds that Sections 4 and 3(*o*) excluded the time spent on both of these activities from the FLSA's compensation requirements.[3] After a bench trial, the District Court ruled for respondents on the walking time component of this petition and also determined that donning and doffing certain of the attire detailed above was compensable. See Pet. App. 35a-82a.

On appeal to the Ninth Circuit, the Secretary of Labor filed an *amicus* brief. On the Section 4 issue, the Secretary argued that time spent walking from the locker to the work station and back is compensable as being all in a day's work. With respect to the threshold question whether the attire worn by meat-packing employees constitutes "clothes" within the meaning of Section 3(*o*)'s exclusion, the Secretary explained that the Administrator had issued an Opinion Letter to a third party interpreting Section 3(*o*) to apply to certain protective clothing worn by meatpacking employees like the plaintiffs in this case. In particular, the Opinion Letter supported IBP's position and *rejected* the conclusion that "[S]ection 3(*o*) does

[3] In addition, respondents' complaint, and the opinions below, addressed several other FLSA and State law issues that are not the subject of this petition.

not apply to the putting on [or] taking off . . . of the protective safety equipment typically worn in the meat packing industry, such as mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts." *Id.* at 94a.

In her *amicus* brief, the Secretary explained that the 2002 Opinion Letter overrode a contrary interpretation adopted for the first time in 1997. In the 2002 Opinion Letter, the Administrator reasoned that the 1997 interpretation had "never previously been put forward by the Administrator" and was out of keeping with the historical treatment of Section 3(*o*) by both "a number of regional and district officials" as well as "the Office of the Solicitor." Pet. App. 94a. The 1997 opinion, moreover, "confined its reasoning to a single sentence," simply stating without explanation the legal conclusion that "'clothes' has a 'plain meaning' which excludes: (i) 'protective' articles that (ii) may be 'cumbersome in nature' and (iii) are 'worn over . . . apparel.'" *Id.* at 98a (ellipses in original). Based upon a "careful review of the interpretation of [S]ection 3(*o*)," including "a reexamination of the statute and legislative history," a review of "the history and purpose" of the provision, and consideration of an OSHA regulation that includes protective gear as a *subset* of clothing (see 29 C.F.R. § 1910.1030(b)), the Administrator restored the position to which the agency had long adhered prior to the 1997 opinion. Pet App. 96a-100a. This interpretation, the Administrator explained, reaffirms that a "function" of Section 3(*o*) is "to allow companies and unions to agree to treat as non-compensable clothes-changing activities that otherwise would be compensable under the Portal Act." *Id.* at 97a-98a.[4]

[4] Of course, such agreements can be embodied not only in a collective bargaining agreement, but in a custom or practice that can arise in a variety of ways under a collective bargaining agreement. *See, e.g., Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 (5th Cir. 2001) (per curiam) (bargaining history); *Arcadi* v. *Nestle Food Corp.*, 38 F.3d 672, 674-75 (2d Cir. 1994) (union-employer "understanding"); *Turner* v. *City of Phila.*, 96 F. Supp. 2d 460, 463 (E.D. Pa. 2000) ("acquiescence without formal negotiation"), *aff'd*, 262 F.3d 222 (3d Cir. 2001).

C. The Decision of the Court of Appeals

The United States Court of Appeals for the Ninth Circuit affirmed the District Court in relevant part. *First*, as to the Section 4 "walking time" issue, the Ninth Circuit agreed with the District Court that the workday includes "'the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment.'" Pet. App. 18a (ellipses in original). Acknowledging that the First Circuit had reached a contrary conclusion, the Ninth Circuit reasoned that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Id.* at 19a; *id.* at 19a n.10 ("*But see Tum* v. *Barber Foods, Inc.*, 331 F.3d 1 (1st Cir. 2003)").

Second, as to the Section 3(*o*) clothes-changing exclusion, 29 U.S.C. § 203(*o*), the Ninth Circuit affirmed the District Court's interpretation that Section 3(*o*) did not exclude the "time spent putting on personal protective equipment" from compensation requirements. Pet. App. 17a. Notwithstanding the careful consideration reflected in the 2002 Opinion Letter, the Ninth Circuit rejected the Administrator's interpretation as a "new, inconsistent interpretation" and, without further analysis, accorded the letter no deference. See *id.* at 17a n.9.

Treating Section 3(*o*)'s exclusion as an exemption, the panel relied heavily upon the general notion that exemptions are not permitted "'except [in contexts] *plainly and unmistakably* within the[] [given exemption's] terms and spirit.'" Pet. App. 16a (quoting *Klem* v. *County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000)) (alterations and

emphases in original).[5] The panel concluded that there was no such "plain and clear § 3(*o*) fit" for respondents' protective gear. *Id.* Finally, the court observed that specialized protective gear is "different in kind from typical clothing" in the sense that the "admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit." *Id.* The Ninth Circuit thus concluded that "from both a regulatory and common sense perspective, 'changing clothes' means something different from 'donning required specialized personal protective equipment'" and IBP was therefore not entitled to Section 3(*o*)'s exclusion. *Id.* at 16a-17a.

REASONS FOR GRANTING THE PETITION

This case presents two fundamental and recurring questions of federal law. First, at least three courts of appeals have issued conflicting decisions on the scope of the Portal Act's "walking time" provision. Review by this Court is thus plainly warranted to provide uniformity on an issue that has profound implications for the economy as a whole.

Second, there is widespread confusion in the courts of appeals concerning (a) the circumstances in which agency pronouncements that are not the product of notice-and-comment rulemaking or formal adjudications—such as the Department of Labor Opinion Letter at issue in this case—are entitled to *Chevron* deference, and (b) what deference, if any, attaches to non-binding agency pronouncements, particularly where, as here, the agency overturns a recent, and aberrant, interpretation. Indeed, the lower courts have expressed considerable frustration in attempting to apply this Court's decisions in *United States* v. *Mead*, 533 U.S. 218 (2001), and *Barnhart* v. *Walton*, 535 U.S. 212 (2002), to less formal

[5] Section 3(*o*) is contained in the definitions section of the FLSA. By contrast, exemptions from the Act's overtime and minimum wage requirements are set forth in Section 13 of the FLSA. 29 U.S.C. § 213.

agency pronouncements. This case thus affords the Court an opportunity to provide much needed guidance on these critical and frequently recurring questions of administrative law.

I. THERE IS AN ACKNOWLEDGED AND INTOLERABLE CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE COMPENSABILITY OF "WALKING TIME" UNDER THE PORTAL ACT.

There is an acknowledged and irreconcilable conflict among the courts of appeals on the fundamental issue whether employees are entitled to compensation under the Portal Act for "walking time" between arguably compensable pre- and post-shift clothes changing and the actual work station. This Court has long recognized its "importan[t]" role in interpreting the Portal Act, especially where, as here, there is "a conflict between the circuits on the subject." *Steiner* v. *Mitchell*, 350 U.S. 247, 248 (1956). Because, as Congress itself expressly found, a breathtaking array of harms can attend uncertainty and overbreadth concerning the compensability of "walking time," the Court should decide this important yet unresolved issue of statutory interpretation.

A. There Is An Acknowledged Conflict Among The Courts Of Appeals About When Workers Are Entitled To "Walking Time" Compensation Under The Portal Act.

The decision below creates a conflict over whether Section 4(a) requires employers to compensate employees for all walking time that occurs between an employee's actual work station and pre- and post-shift activities, such as clothes changing, which might be deemed compensable if they are found to be "integral and indispensable" to the employee's principal work activity. The Ninth Circuit answered that question in the affirmative. It reasoned that, because the donning of protective attire is an integral and indispensable

preliminary work activity, it is therefore a "'principal [work] activity,'" such that "[a]ll activities performed thereafter—such as 'walking'—thus occur during the 'principal' workday and are compensable." Pet. App. 18a (quoting *Steiner*, 350 U.S. at 252-53).

By contrast, as the Ninth Circuit acknowledged, the First Circuit squarely rejected the very reasoning the Ninth Circuit adopted. The First Circuit concluded that, even if clothes donning and doffing is an integral part of the employees' principal activity, walking that occurs after such donning (but prior to arrival at the work station) and before such doffing (after departure from the work station) is not compensable. *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003). The Tenth Circuit has likewise held that even where the donning and doffing of personal protective equipment at a similar IBP facility "was a compensable work activity," employees were not entitled to compensation for post-donning and pre-doffing walking time. *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994).

More specifically, the courts of appeals disagree about whether the right to compensation can start and stop during the day. On the one hand, the Ninth Circuit found "nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." Pet. App. 19a. By contrast, as the Tenth Circuit described it, even compensable clothes changing is not the "first and last principal activit[y] of the workday which would commence and toll the running of the timeclock" such that all walking time between clothes changing and the work station is compensable. *Reich*, 38 F.3d at 1127. The First Circuit implicitly adopted the Tenth Circuit's reasoning by ruling that, even where clothes changing is integral to the employee's principal activity, walking time to and from the work station may be excluded. *Tum*, 331 F.3d at 6.

At the heart of this disagreement is the Ninth Circuit's misunderstanding of this Court's decision in *Steiner*. There, the Court held that:

> activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are [1] an integral and indispensable part of the principal activities for which the covered workmen are employed *and* [2] *are not specifically excluded by Section 4(a)(1).*

350 U.S. at 256 (emphasis added). The "integral and indispensable" activities at issue in *Steiner* were "changing clothes at the beginning of the shift and showering at the end." *Id.* at 248. Because there was no claim in *Steiner* that walking to and from the actual work station was itself an "integral and indispensable" activity, there was no need to exclude such walking time from the category of compensable "indispensable" activities. Accordingly, *Steiner*'s reference to activities "not specifically excluded by Section 4(a)(1)" can only be understood as a clarification that an "integral and indispensable"—and therefore compensable—activity does not render compensable all walking that occurs between that "integral and indispensable" activity and the work station.

Indeed, the Department of Labor has made this very point. In provisions directly addressing preliminary and postliminary activities, the Department has appended the following footnote:

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity'. See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. *This does not necessarily mean, however, that travel between the washroom or clothes-changing place*

and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which 4(a)[(1)] refers.

29 C.F.R. § 790.7(g) n.49 (citation omitted; emphasis and alteration added). Like this Court's decision in *Steiner*—which also relied extensively on colloquies between Senators McGrath and Cooper—the Department's adoption of this explanation makes clear that a compensable "integral and indispensable" activity does not render compensable all time spent walking between that activity and the actual work station. See *Tum*, 331 F.3d at 6 (relying on this provision to reach a result contrary to that of the court below).[6]

Accordingly, there is a well-developed, clear, and irreconcilable conflict among the courts of appeals about the applicability of Section 4 to walking time that occurs between the work station and compensable clothes-changing activity. That conflict plainly warrants this Court's review.

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[6] This conclusion is further buttressed by the use of the phrase "actual place of performance" in Section 4(a)(1), which "emphasizes that the ordinary travel at the beginning and end of the workday . . . includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity." 29 C.F.R. § 790.7(e); *see id.* § 790.7(f) (walking "between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity" generally is exempted under Section 4(a)). In addition, where, as here, "an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there for work in accordance with the employer's requirement." *Id.* § 790.6(b). Here, employees must report to their work stations on the production line at the time the first meat arrives at their own stations for processing. *See* Pet. App. 3a-4a.

B. Whether Employers Are Required To Compensate Employees For "Walking Time" Is Recurring And Important.

The conflict created by the courts of appeals presents a core and recurring issue with profound implications for the Nation's economy as a whole. Accordingly, it should be answered definitively now.

This Court has long recognized "the importance of the interpretation of the portal-to-portal provisions in the administration of the Fair Labor Standards Act." *Steiner*, 350 U.S. at 248. Indeed, in enacting the Portal Act, Congress found that uncertainty and overbreadth in the interpretation of the FLSA causes numerous significant harms to the national economy. As the text of the statute itself recites, these harms include: (1) the "financial ruin of many employers" and "serious[] impair[ment of] the capital resources of many others"; (2) "seriously impair[ing]" "the credit of many employers"; (3) "extended and continuous uncertainty on the part of industry"; (4) "gross inequity of competitive conditions between employers and between industries"; (5) "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; (6) "interfere[nce] with" "voluntary collective bargaining" and the creation of "industrial disputes between employees and employers and between employees and employees"; (7) courts nationwide "be[ing] burdened with excessive and needless litigation"; (8) the Public Treasury "be[ing] deprived of large sums of revenues"; (9) the cost of goods and services to the government "be[ing] unreasonably increased," including "serious[]" increases in the "cost of war contracts"; and (10) "serious and adverse effects upon the revenues of Federal, State, and local governments." 29 U.S.C. § 251(a). The Ninth Circuit's broad reading of Section 4 and the existing uncertainty in the courts of appeals gives rise to many, if not all, of the same concerns.

Commentators have noted, for example "the dramatic increase in the use of FLSA class actions," such as the lawsuit here. Joseph E. Tilson et al., *Litigating Lawsuits Under The FLSA—The Fastest Growing Area Of Employment Litigation*, 697 PLI/Lit. 649, 657 (Oct.-Nov. 2003). This litigation explosion threatens to tax judicial resources and threatens employers with massive and unexpected liabilities—two of the very evils the Portal Act was meant to prevent. "Although, in the typical case, each individual's claim . . . is generally small, when plaintiffs join together . . . the resulting damages (and attorneys' fees) can be immense." *Id.* at 655. Indeed, "[t]he aggregation of claims, particularly as class actions, profoundly affects the substantive rights of the parties to [a] litigation. Notably, aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants. The more aggregation, the greater the effect on the litigation." *De Asencio* v. *Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003) (discussing both FLSA opt-in and Rule 23 opt-out state-law classes in clothes-changing case).

Similarly, the split of authority among the circuits creates unfair disparities in competitive conditions that can harm not only employers, but also workers in particular regions of the country. This very case creates the anomalous result that employees at the same company may be entitled to different "walking time" compensation depending upon the circuit in which their work facility is located. Compare Pet. App. 17a-19a ("walking time" compensable for workers at IBP facility in the Ninth Circuit), and *Reich*, 38 F.3d at 1127 ("'walk[ing] time'" not compensable for workers at IBP facility in the Tenth Circuit). This disparity creates incentives for companies to relocate jobs to States outside the Ninth Circuit, and thus threatens to impose job losses and gains not based on market considerations but on the non-uniform application of federal law. Indeed, many other industries that involve work requiring use of protective gear are affected by these

anomalous results, including, for example, the poultry-processing, pharmaceutical, medical equipment, oil and gas processing, biotechnology, and other manufacturing industries. In sum, the proper interpretation of Section 4(a) should be answered definitively for the benefit of all employers and employees nationwide.

C. The Ninth Circuit Erred In Holding That The "Walking Time" Here Was Compensable.

Finally, the Court should grant review to correct the Ninth Circuit's erroneous interpretation of the Portal Act. Not only does the decision below misread this Court's decision in *Steiner* and ignore Labor Department guidance, but also it is not faithful to the purpose of the Portal Act, which was to minimize mandatory compensation for pre- and post-shift walking time. Indeed, as the First Circuit has recognized, "Congress did not intend for most types of walking to be compensable." *Tum*, 331 F.3d at 6; see also *id.* ("By stretching the traditional understanding of primary activity to cover donning and doffing in very limited circumstances, Congress was not creating an avenue to circumvent" Section 4(a)).

Moreover, as the First Circuit points out, the rule adopted by the Ninth Circuit below leads to "nonsensical" results. *Id.* In some facilities, for example, employees walk between several gear distribution locations before arriving at their work station. Under the Ninth Circuit's decision, employers can seek to avoid or minimize compensable walking time "by placing all of the items at one location instead of at a few locations" or by placing changing locations closer to work stations. *Id.* These decisions would not be driven by any legitimate interest in efficiency, but rather by an artificial effort to avoid liability for walking time that Congress never intended to make compensable.

For all of these reasons, the Court should grant the petition to correct the Ninth Circuit's error, to answer this important

and recurring question of federal law, and to end the irreconcilable conflict among the courts of appeals.

II. THIS COURT SHOULD GRANT THE PETITION TO PROVIDE MUCH NEEDED GUIDANCE CONCERNING THE DEFERENCE DUE LESS FORMAL AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTORY TERMS.

The Ninth Circuit's decision also creates a conflict among the circuits concerning the proper interpretation of the term "clothes" in Section 3(*o*). The Fifth Circuit rejected as "nonsensical" the claim that "sanitary garments . . . are not 'clothes' under § 203(*o*)." *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (per curiam); see also *Saunders* v. *John Morrell & Co.*, No. C88-4143, 1991 WL 529542, at *1, *4 (N.D. Iowa Dec. 24, 1991) (Section 203(*o*) applies to exclude time spent by meatpacking employees in changing into and out of "steel-mesh gloves, synthetic-mesh gloves, goggles, helmets, arm guards, belly guards, knife and cut resistant gloves, knife guards, steel-toed shoes, rubber boots, rubber gloves, rubber aprons, and steel-mesh aprons"); *Nardone* v. *General Motors, Inc.*, 207 F. Supp. 336, 338, 340 (D.N.J. 1962) (time spent by metal finishers in changing into and out of "coveralls, gloves, aprons, goggles and hoods" excluded from compensation by Section 203(*o*)).

The Ninth Circuit, by contrast, concluded that certain attire worn in the meat-packing industry falls outside the ambit of the term "clothes." Pet. App. 16a-17a & n.9. Although the agency charged with administering and enforcing the FLSA has issued an Opinion Letter that interprets this very term to encompass the attire at issue in this case, the Ninth Circuit flatly dismissed the agency's interpretation as a "new" and "inconsistent" view that was entitled to no deference. *Id.* at 17a n.9. This decision thus provides an opportunity to resolve the decisional conflict concerning Section 3(*o*) and for the Court to clear up significant confusion in the circuits in the wake of *United States* v. *Mead*, 533 U.S. 218 (2001), about

the appropriate degree of deference due agency interpretations that (i) are the result of less formal processes than formal notice-and-comment rulemaking and (ii) restore a prior agency position.

A. There Is Significant Confusion In The Courts Of Appeals About The Extent Of Deference Due "Less Formal" Department Of Labor Statutory Interpretations.

The Ninth Circuit's refusal to defer to an agency opinion letter implicates a key open question concerning the degree of deference due agency interpretations that are not the product of notice-and-comment rulemaking or formal adjudications. The considerable confusion, and unusual expressions of frustration, that this question has occasioned in the lower courts demonstrates the pressing need for guidance from this Court.

1. Prior to the decision in *United States* v. *Mead*, 533 U.S. 218 (2001), this Court stated in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), that agency "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference," *id.* at 587—*i.e.*, the legally binding effect given to formal and non-arbitrary interpretations of ambiguous statutory provisions by the agency charged with administering those provisions. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In *Mead*, however, the Court appeared to retreat from *Christensen*'s broad statement, explaining that *Chevron* deference may still apply to less formal agency statutory interpretations "when it appears that Congress delegated authority to the agency generally to make rules carrying out the force of law"—a showing that may be made "in a variety of ways." 533 U.S. at 226-27.

Shortly thereafter, in *Barnhart* v. *Walton*, 535 U.S. 212 (2002), the Court confirmed its apparent departure from the stark language of *Christensen*, observing that even where an agency "reached its interpretation through means less formal than 'notice and comment' rulemaking," this "does not automatically deprive that interpretation of the judicial deference otherwise its due" under *Chevron*. *Id.* at 221. "If this Court's opinion in *Christensen* . . . suggested an absolute rule to the contrary, our later opinion in . . . *Mead* . . . denied the suggestion." *Id.* at 222 (citations omitted).[7] The Court went on to state that:

> the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Id. Put another way, whether *Chevron* deference is due "depends in significant part upon the interpretive method used and the nature of the question at issue." *Id.*

Thus, while the Court has clearly stated that some set of agency interpretations derived from less formal means are entitled to *Chevron* deference, and has specifically left open the possibility that agency opinion letters may qualify for such treatment, it remains entirely unclear which "less formal" interpretations are entitled to such deference. Indeed,

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[7] The Court again confirmed its full retreat from *Christensen* in *Alaska Department of Environmental Conservation* v. *EPA*, where it conspicuously omitted "opinion letters" from its quotation of *Christensen*: "'Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.'" — U.S. —, 124 S. Ct. 983, 1001 (2004) (ellipses in original).

numerous courts and commentators have openly sought clarification of the "important questions [left] unanswered" by *Mead* and *Barnhart*. Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 5, 10 (4th ed. 2003 Supp.); see, *e.g.*, Robert A. Anthony, *Keeping Chevron Pure*, 5 Green Bag 371, 371 (Summer 2002) (*Barnhart* has "sow[n] the seeds of grievous confusion in the law of *Chevron* deference"). As Judge Richard Posner put it, although *Barnhart* suggests "a merger between *Chevron* deference and *Skidmore*'s . . . approach" of varying deference according to the circumstances, after *Barnhart*, all that is clear is that *Chevron* deference *may* be due where there is "something more formal, more deliberative, than a simple announcement." *Krzalaic* v. *Republic Title Co.*, 314 F.3d 875, 879, 881 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 2641 (2003). Exactly what that "something" may be, however, remains elusive. "After *Mead*, it is possible to know only that . . . less formal pronouncements like interpretive rules and informal adjudications may or may not be entitled to *Chevron* deference." Davis & Pierce, Jr., *supra*, § 3.5, at 6-7; see *Matz* v. *Household Int'l Tax Reduction Inv. Plan*, 265 F.3d 572, 575 (7th Cir. 2001) (although *Mead* indicated "that *Chevron* deference may apply to interpretations developed from less formal rulemaking procedures, it did not expressly outline when this would be the case"), *cert. denied*, 535 U.S. 954 (2003).

2. In particular, there is considerable confusion in the lower courts concerning the degree of deference due the very type of agency pronouncement that was at issue in *Christensen* and is again at issue here—a Labor Department opinion letter. As Judge Edith Jones observed on behalf of the Fifth Circuit, "reliance on *Christensen* wholly to forestall our deferring to these authorities is . . . misplaced" after *Barnhart* and *Mead*. *Houston Police Officers' Union* v. *City of Houston, Tex.*, 330 F.3d 298, 304 n.7 (5th Cir.), *cert. denied*, 124 S. Ct. 300 (2003). But the court also recognized:

"Nor is it clear, after . . . *Mead* . . . whether these pronouncements are sufficiently authoritative to merit *Chevron* deference." *Id.* at 304-05 (citation omitted). Similarly, a recent opinion from the Sixth Circuit reflects the confusion over what level of deference applies to these interpretations. See *Herman* v. *Fabri-Centers of Am., Inc.*, 308 F.3d 580, 592 (6th Cir. 2002) (acknowledging the "great deference" generally accorded the officers and agency charged with statutory enforcement, but merely noting "[t]he informative nature" of the Administrator's opinion letters and stating "we would hold as we do even in the absence of such opinion letters"), *cert. denied*, 537 U.S. 1245 (2003).

Much of this confusion arises from the fact that, while *Mead* requires courts to focus on Congress's intent in delegating power to the agency to determine whether an agency's action has the force of law, it "[u]nfortunately[] . . . provides incomplete guidance about how courts should undertake this inquiry." Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With The Force Of Law: The Original Convention*, 116 Harv. L. Rev. 467, 470 (2002). In particular, neither *Mead* nor any subsequent case answers the fundamental question: "what language must Congress use to indicate that an agency has been given power to make rules with the force of law?" *Id.* at 591.

Because there is a clear and significant need for an elaboration of *Mead*'s standards generally, and in particular their application to the recurring question of the deference due a Department of Labor opinion letter, this Court should grant the petition and rule that the power Congress bestowed on the Administrator with respect to opinion letters entitles such letters to *Chevron* deference. The opinion letters of the Administrator are equivalent to the opinion letters of the Comptroller of the Currency, whose "deliberative conclusions" concerning the meaning of a banking statute were entitled to *Chevron* deference. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257

(1995) (internal quotation marks omitted). Just as the Comptroller has "'personal authority' under the National Bank Act," and "'is charged with the enforcement of banking laws,'" *Mead*, 533 U.S. at 231 & n.13, so too here, the Administrator is appointed by the President, confirmed by the Senate, and is charged with "administration and enforcement" of the FLSA, 29 U.S.C. § 204(a); see 29 C.F.R. § 790.1(b). Moreover, in stark contrast to the United States Customs Service tariff classification rulings at issue in *Mead*, Congress intended the opinion letters at issue here to have the force of law in the sense that they may be relied on by third parties as a good-faith defense against FLSA liability. See 29 U.S.C. § 259(a). Cf. *Mead*, 533 U.S. at 223, 231-32, 233 (finding "no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law" where, for example, the rulings "make[] it clear that a letter's binding character as a ruling stops short of third parties," and "'no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any [other] transaction'").

3. The current uncertainty about when *Chevron* deference applies necessarily implicates the degree of deference owed agency interpretations that reflect a considered change in position, as was true of the opinion letter at issue here. Before *Mead* and *Barnhart*, agency consistency was analyzed differently depending upon whether the agency's interpretation was entitled to *Chevron* deference, or to the less robust deference described in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Thus, the deference due under *Skidmore* varied according to Justice Jackson's familiar host of factors which included, among other things, the "consistency with earlier and later pronouncements." *Id.* at 140. Conversely, *Chevron* recognized that an agency may have a range of reasonable choices "not instantly carved in stone," but subject to reconsideration "on a continuing basis." 467 U.S. at 863-84. Under *Chevron*, therefore, it is "entirely

appropriate" for an agency's interpretation to change, considering that agencies are part of the "political branch of the Government" tasked with "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66; see *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency" provided its changes are not "[s]udden and unexplained").

Barnhart suggests, however, that an agency's consistency may be a consideration in determining whether *Chevron* deference is due at all. Emphasizing that "the Agency's interpretation is one of long standing," the Court in *Barnhart* suggested that this "careful consideration the agency has given over a long period" contributed to "indicate that *Chevron*" applied. 535 U.S. at 221-22; see also *Mead*, 533 U.S. at 247, 249-50 (Scalia, J., dissenting) ("*Skidmore* deference gives the agency's *current* position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future.") (emphasis added; emphasis in original omitted). Indeed, Judge Posner has interpreted *Barnhart* to suggest "a merger between *Chevron* deference and *Skidmore*'s," leaving the lower courts in a "thicket" of unanswered questions. *Krzalaic*, 314 F.3d at 879, 881.

This case thus presents an opportunity to resolve the current confusion. The lower court simply rejected the Administrator's Opinion Letter because it reflected a change in position from a prior interpretation adopted in 1997. If, as petitioner contends, the Administrator's opinion letters are entitled to *Chevron* deference, the lower court's action was plainly erroneous. Alternatively, if, as *Barnhart* suggests, agency consistency is a factor in determining *whether Chevron* deference applies, the Administrator's thoughtful

and well-reasoned decision to repudiate a recent interpretation, and reinstitute a prior position of far longer standing, affords this Court an opportunity to answer the many questions that *Barnhart* raised in this area.

B. The Degree Of Agency Deference Due "Less Formal" Agency Interpretations Is Recurring And Important.

That the degree of deference due "less formal" agency interpretations of statutory terms is an important and recurring question is self-evident. Indeed, it implicates a core question of administrative law: in what circumstances must courts defer to an agency's interpretation of ambiguous statutory provisions. As is apparent from the above discussion, confusion about the degree of deference due the Department of Labor's opinion letters alone presents an important, recurring and unanswered question.

The need for guidance on the degree of deference due a variety of "less formal" agency determinations also reverberates through a number of agency contexts. As one leading commentator explains, the "[c]ircuit courts are struggling in their efforts to apply . . . *Chevron* to a variety of types of agency pronouncements." Davis & Pierce, Jr., *supra*, § 3.5, at 10. Described another way, the Court's recent cases "leave[] us searching for the tests that might determine which informal adjudications qualify for *Chevron* deference," but "[u]nfortunately, we have no idea" what appropriate lawmaking procedures might be. William S. Jordon, *United States v. Mead: Complicating the Delegation Dance*, 31 Envtl. L. Rep. 11425, 11428-29 (2001).

Accordingly, the Court should grant certiorari to provide additional direction to the courts of appeals for determining whether, in general, "less formal" agency interpretations such as opinion letters are entitled to *Chevron* deference and, in particular, whether the Administrator's opinion letters are so entitled.

C. The Ninth Circuit Erred In Utterly Disregarding The Agency's Interpretation.

In all events, the Ninth Circuit below erred by rejecting out of hand the agency's "new" interpretation. If *Chevron* applies, the Ninth Circuit erred in disregarding the agency's view where the agency did not succumb to the "pitfalls" of agency change (such as making "[s]udden and unexplained change"), given that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley*, 517 U.S. at 742. If *Skidmore* applies, the Ninth Circuit erred by "ignor[ing] the agency interpretation." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 855 (2001). The Ninth Circuit failed to "assess that interpretation against multiple factors and determine what weight [it] should be given" in a "nuanced, context-sensitive rubric" *Id.* at 836, 855. Thus, to the extent *Chevron* does not apply, this case presents an opportunity for the Court to clarify that, even under *Skidmore*, courts cannot refuse to defer to a well-reasoned change in an administrative interpretation simply because the new interpretation represents a change in agency position.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 26, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 02-35042, 02-35110.

GABRIEL ALVAREZ, individually and as class representative; RANULFO GUTIERREZ, individually and as class representative; PEDRO HERNANDEZ, individually and as class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellees,

v.

IBP, INC., a Delaware corporation,
Defendant-Appellant.

GABRIEL ALVAREZ, individually and as class representative; RANULFO GUTIERREZ, individually and as class representative; PEDRO HERNANDEZ, individually and as class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellants,

v.

IBP, INC., a Delaware corporation,
Defendant Appellee.

Argued and Submitted April 8, 2003.
Filed Aug. 5, 2003

Appeal from the United States District Court for the Eastern District of Washington; Robert H. Whaley, United States District Judge, Presiding. D.C. No. CV-98-05005-RHW.

Before D.W. NELSON, THOMAS, Circuit Judges, and ILLSTON, District Judge.[1]

THOMAS, Circuit Judge.

Perhaps the packing plant employees in Pasco, Washington, should have heeded Henry David Thoreau's warning to "beware of all enterprises that require new clothes." The central dispute in this class action lawsuit is whether IBP, Inc. ("IBP") should be required to compensate its employees for the time it takes to change into required specialized protective clothing and safety gear. Under the circumstances presented by this case, we conclude that it must. We affirm in part and reverse in part.

I

From the time that publication of Upton Sinclair's novel *The Jungle* provoked President Theodore Roosevelt to secure passage of the Meat Inspection Act of 1906, the meat packing industry has been one of the most regulated businesses in the United States. This is not only a product of concerns over food purity. According to the United States Department of Labor's Bureau of Labor Statistics, employment at a packing plant is still one of the most dangerous jobs in America, with multiple thousands of workers injured on the job every year. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Industry Injury and Illness Data* (2002), *at* http://www.bls.gov/iif/oshsum.htm.

IBP, Inc. is the world's largest producer of fresh beef, pork, and related products. Headquartered in Dakota Dunes, South Dakota, IBP operates a number of meat processing plants throughout the American West and Midwest. Through meat-related innovation and gradual corporate acquisition, IBP has built a substantial food empire, reaping over $13 billion in

[1] The Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

sales in 1999 alone.

Among IBP's many meat processing facilities is a "kill and processing plant" in Pasco, Washington ("the Pasco plant"). As the moniker suggests, the Pasco plant includes slaughter and processing work sections, both of which play a direct role in the carcass "disassembly process." The disassembly of a beef carcass takes two-to-three days. After the animal is killed, the carcass moves along a series of chains in the slaughter division, eventually coming to rest in a cooled storage facility. After remaining in storage for at least twenty-four but no more than forty-eight hours, the carcass is transported across a group of chains and belts in the processing division, where processing employees cut, trim, and divide the carcass into a variety of pieces.

The Pasco plant divides its slaughter and processing staffs into separate work crews, assigning these crews to work shifts. Pasco plant production line employees, who are represented by Teamsters Local Union No. 556 and who are covered by a collective bargaining agreement, are required to be at their work stations and prepared to work as the first piece of meat comes across the production line. However, before they are able to assume their work stations all Pasco plant employees must complete a number of preliminary tasks, and before employees may leave the Pasco plant at the end of a shift, most of these preliminary tasks must be completed in inverse form. Each Pasco plant job classification has specific tool, supply, walk-time, and gear requirements, so each employee's preliminary and postliminary duties are somewhat distinct; still, for all Pasco plant production line employees, a general pattern obtains: At the start of a shift, Pasco plant employees must gather their assigned equipment, don that equipment in one of the Pasco plant's four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors. At the end of every shift, employees must clean, restore, and

replace their tools and equipment, storing all of it at the Pasco plant itself.[2]

Until July of 1998, the Pasco plant's shifts ran eight hours, the first four-hour block of which was split by a paid fifteen-minute rest-break, and the two four-hour spans of which were divided by a thirty-minute unpaid meal break.[3] In July of 1998, IBP restructured its shift time to include four minutes of so-called "clothes" time, thereby reducing the overall work time to seven hours and fifty-six minutes. In the fall of 1999, the Pasco plant reduced its shift time to seven hours and fifty-

[2] The record is replete with lists of outer garments and protective equipment the Pasco plant employees must don and doff. The district court's findings of fact on this point are thorough. In sum, all employees must wear a sanitary outer garment that is provided and washed each night by IBP; all employees must wear some form of a plastic hardhat, a hair net, and ear plugs, and all employees—save "gutter" employees in the slaughter division—must wear a face shield or safety goggles; all employees wear some sort of glove, with most processing employees using a number of sets per day of grip-facilitative and warmth-providing "yellow cotton gloves," and with some slaughter employees donning these yellow gloves and/or plastic or rubber gloves for enhanced grip and protection against blood and water saturation; all employees wear liquid-repelling sleeves, aprons, and leggings; all employees wear safety boots/shoes, all of which must be wiped/hosed after the end of a shift; and many employees opt to wear weight-lifting-type belts to prevent back injury. In addition, so-called "knife users" don an assortment of protective gear on their hands, arms, legs, and torsos; this gear often constitutes chain-link (i.e., "mesh") metal aprons, leggings, vests, sleeves, and gloves, and plexiglass arm guards, Kevlar gloves (that is, "can't cut" or "Polar" gloves), and puncture-resistant protective sleeves.

[3] In the early 1970's, the Pasco plant's first proprietor, Columbia Foods, entered a collective bargaining agreement with the union in which employees were allotted thirty minutes per week for "clothes changing." In 1976, IBP purchased the Pasco plant from Columbia Foods, and included a similar "clothes changing" provision in the 1979 iteration of the bargaining agreement. In the 1982, 1986, 1992, and current versions of the collective bargaining agreement, however, "clothes changing time" was negotiated but excluded.

one minutes. Long-running litigation between IBP and the United States Department of Labor (hereinafter "USDOL") in the 1990s spurred much of IBP's shift-time reduction. In the course of that litigation, damage and wage issues comparable to those raised in this case were decided, but the litigation focused singularly on IBP's non-unionized plants. *See Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir.1994) (holding IBP liable for unpaid pre-shift and post-shift donning, doffing, and cleaning of special packinghouse industry safety equipment and for time spent between waiting to pick up and return knives).[4]

Once a shift begins, the Pasco plant employees' time is strictly regulated and monitored. As a rule, employee rest or meal-break time begins as soon as the last piece of meat passes on the production line, and, as a rule, employees must be completely prepared to resume work as soon as the break period ends. When departing the processing and slaughter floors—whether to go to the cafeteria or to the restroom[5]—employees are permitted to leave only hats, hairnets, goggles, earplugs, and boots in place; outer garments, protective gear, gloves, scabbards, and chains must be removed. For many Pasco plant employees, the operation of IBP's mandatory donning and doffing rules necessarily impinges—if not more—their unpaid thirty-minute meal break time.

[4] Apparently as a consequence of IBP's decision to relocate its knife distribution areas and to reposition sinks along its production line, IBP and USDOL agreed to lower an initial fourteen-minute figure to four minutes in 1998. In April 1998, the Department of Labor filed a second complaint against IBP, seeking back pay for post-*Reich* FLSA violations at IBP's non-unionized plants. *See Herman v. IBP,* 98-CV-2163-JWL (D.Kan.).

[5] IBP "strongly encourages" its employees to use the restroom only during unpaid meal break time, expressly limiting non-break-time restroom use to situations of emergency. "Such emergencies," IBP instructs its employees, "should seldom occur."

To help monitor employee arrival and departure times, IBP instituted a mandatory, computerized "swipe card" system at the Pasco plant. IBP does not use the data its swipe card system gathers in calculating employee pay. Instead, IBP pays its Pasco plant employees according to a "gang time pay" model, which bases employee remuneration entirely on the times during which employees are actually cutting and bagging meat. Under this "gang time" framework, the period in which IBP considers its employees to be performing compensable work commences with the processing of the first piece of meat and ends with the processing of the last, notably excluding any time spent abiding the Pasco plant's required pre or post-shift routines.

In 1999, believing parts of IBP's compensation practices to be unlawful, the Pasco plant's slaughter and processing employees brought this class action suit under § 16(b) of the Fair Labor Standards Act ("FLSA"), *see* 29 U.S.C. § 216(b) (1999), and related provisions of Washington's Minimum Wage Act ("WMWA") in United States District Court for the Eastern District of Washington. Three aspects of their work-day animated plaintiffs' claim: (1) the pre-shift donning of protective gear and the preparation of work-related tools, including the attendant waiting and walking; (2) the requisite donning and doffing of protective gear during the thirty-minute unpaid meal break; and (3) the post-shift doffing, cleaning, and storing of protective gear and tools.

In response to plaintiffs' complaint, IBP promptly filed a motion for summary judgment with the district court, raising a series of interrelated state and federal defenses to plaintiffs' claims. Rejecting IBP's Labor Management Relations Act preemption theory, the district court granted in part and denied in part IBP's first summary judgment motion.

Just over a year later, the district court denied another of IBP's motions for summary judgment, concluding that Washington state courts were "likely" to adopt a per-hour

standard of minimum wage compliance under the WMWA because (1) the Washington legislature refused to incorporate correlative FLSA language, thereby refusing to adopt FLSA's uniform application of the workweek standard, and (2) the Washington Supreme Court had condoned the use of a per-hour method in *Seattle Professional Engineering Employees Association v. Boeing Co.*, 139 Wash.2d 824, 991 P.2d 1126 (2000), placing that court's imprimatur on a non-workweek approach in certain contexts.

A month later, the district court issued a multi-part order, excluding plaintiffs from the ambit of the Revised Code of Washington § 49.46.130(2)(g)(ii)'s exemption of "agricultural workers" from Washington's forty-hour week rule, finding IBP's potentially willful violation of plaintiffs' rights preclusive of summary judgment on plaintiffs' exemplary damage claim, declaring IBP's putative good faith too dubious to allow summary judgment, and rejecting IBP's efforts to import the holding of *Reich*, 38 F.3d at 1123, wholesale regarding what activities are and are not compensable. A twenty-day bench trial followed.

In spring of 2001, plaintiffs filed a particularized motion for reconsideration, targeting the district court's grant of IBP's motion for summary judgment on their separate Washington Administrative Code § 296-126-092 (1999) rest-break claim. Citing the Washington Court of Appeals' location of an implied cause of action for such claims in *Wingert v. Yellow Freight Systems, Inc.*, 104 Wash.App. 583, 13 P.3d 677 (2001), *aff'd*, 146 Wash.2d 841, 50 P.3d 256 (2002), the district court granted plaintiffs' motion to reconsider and reversed its prior implied right of action decision.

Soon thereafter, the district court conducted a hearing on trial objections, and, weeks later, the district court memorialized its myriad conclusions in another multi-part order. In pertinent part, the district court permitted plaintiffs to recover pay on their state meal-break claim for each minute of break

time lost up to ten minutes, granting a full thirty-minute award to those losing any more than ten minutes; endeavored to calculate damages along the narrowest and most accurate job categories possible; found plaintiffs' trial testimony adequate to establish what equipment in addition to IBP's job-specific lists was "integral and indispensable" to particular job classifications; and, for most Pasco employees, declared the first "compensable activity" to be the donning of protective gear and the last compensable activity to be the doffing of that gear, thus including in the district court's aggregate "compensable" period time spent walking to and from locker room and work station, time spent donning and doffing gear in order to comply with IBP's meal and rest-break exit and entry requirements, and time devoted to waiting for, preparing, handling, replacing, and washing "compensable" equipment.

To similar effect, on September 14, 2001, the district court issued thorough findings of fact and conclusions of law. On plaintiffs' federal law claims, the district court applied 29 U.S.C. § 255(a)'s three-year statute of limitations, also finding that the representative evidence adduced by the plaintiffs adequately and accurately supported a damage award for all plaintiffs, notwithstanding somewhat discrepant job-specific donning and doffing rates, and concluding that FLSA required compensation[6] for all of plaintiffs' work time—e.g., donning, doffing, and cleaning of "integral and indispensable" protective gear; waiting and some walking time during the workday—both during pre-shift and post-shift times and during the thirty-minute meal-break.

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[6] In contrast, as non-compensable "work," the district court listed donning and doffing of non-protective gear (e.g., hard-hats, frocks, ear plugs, safety goggles, and hair nets as non-protective gear), finding it concomitantly less-than-integral to the job and demanding of only *de minimis* time.

On plaintiffs' state law claims, the district court again rejected IBP's preemption theses, determining IBP to have infringed plaintiffs' right to be paid for all hours worked under Revised Washington Code §§ 49.46.020 and 49.46.030 (1999), and finding IBP to have violated plaintiffs' state law rights vis-a-vis meal-break time and second rest-break time, paralleling FLSA in assigning damages for the state meal-break claim.

The district court also rejected IBP's state-law and FLSA-based defenses. On the former, the district court determined that the Washington Supreme Court's decision in *Inniss v. Tandy Corp.*, 141 Wash.2d 517, 7 P.3d 807 (2000) (En Banc), did not mandate adoption of the workweek standard as a matter of state law for hourly employees. On the latter, the district court found that 29 U.S.C. § 203(*o*) (1999), which excludes "clothes changing" and "washing" time from compensable time when these activities are the subject of collective bargaining, offered IBP no relief because § 203(*o*)'s "changing clothes" and "washing" exclusions did not reach donning, doffing, and cleaning of specifically protective, non-clothing-like gear; that IBP lacked "good faith"; and that the Portal-to-Portal Act did not operate to plaintiffs' disadvantage because the donning, doffing, and cleaning of protective gear was "integral and indispensable" to their jobs, fulfilling mutual obligations of employer and employee. Walking and waiting time, the district court continued, occurred during the principal workday and was thus compensable.

For IBP's FLSA and state-law violations, the district court awarded plaintiffs liquidated damages, a measure of "double" (i.e., exemplary) damages with regard to plaintiffs' state meal-break claims, and prejudgment interest. Over the next few months, the district court denied plaintiffs' motion for injunctive relief, conducted a hearing on plaintiffs' motion for fees and sanctions, and memorialized its fee hearing decisions

in a thoroughgoing Order.[7] In its fee Order, the district court denied IBP's Federal Rules of Civil Procedure 52 and 59 motions and denied plaintiffs' motion to strike certain aspects of the record. Both IBP and plaintiffs filed timely notices of appeal. We have jurisdiction under 28 U.S.C. § 1291.

II

It is axiomatic, under the FLSA, that employers must pay employees for all "hours worked." *See* 29 U.S.C. §§ 206, 207 (1999); *Turner v. City of Philadelphia,* 262 F.3d 222, 224 (3d Cir.2001). The threshold question in this case is whether the activities cited by the plaintiffs—donning and doffing, waiting and walking—constitute "work" under the FLSA. We agree with the district court that, under the facts presented by this case, they do.

"Work," the Supreme Court has long noted, is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *See Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944). Definitionally incorporative, *Muscoda*'s "work" term includes even non-exertional acts. *See Armour & Co. v. Wantock,* 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944) (noting that even "exertion" is not the *sine qua non* of "work" because "an employer . . . may hire a man to do nothing, or to do nothing but wait for something to happen").

Plaintiffs' donning and doffing, as well as the attendant retrieval and waiting, constitute "work" under *Muscoda* and *Armour's* catholic definition: "pursued necessarily and primarily for the benefit of the employer," *Muscoda,* 321 U.S. at 598, 64 S.Ct. 698, these tasks are activity, burdensome or not,

[7] Neither party has challenged any aspect of the district court's fee decision.

performed pursuant to IBP's mandate for IBP's benefit as an employer. 323 U.S. at 133, 65 S.Ct. 165, 321 U.S. at 598, 64 S.Ct. 698. The activities, therefore, constitute "work."

That such activity is "work" as a threshold matter does not mean without more that the activity is necessarily compensable. The Portal-to-Portal Act of 1947 relieves an employer of responsibility for compensating employees for "activities which are preliminary or postliminary to [the] principal activity or activities" of a given job. 29 U.S.C. § 254(a) (1999). Not all "preliminary or postliminary" activities can go uncompensated, however. "[A]ctivities performed either before or after the regular work shift," the Supreme Court has noted, are compensable "if those activities are an integral and indispensable part of the principal activities." *Steiner v. Mitchell,* 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956); *see also Mitchell v. King Packing Co.,* 350 U.S. 260, 261, 76 S.Ct. 337, 100 L.Ed. 282 (1956); 29 C.F.R. § 790.7(h) (1999) ("[A]n activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions.").

The Supreme Court's approach to this "principal," "integral and indispensable" duty question is context-specific. To be "integral and indispensable," an activity must be necessary to the principal work performed and done for the benefit of the employer. *See Barrentine v. Arkansas-Best Freight Sys., Inc.,* 750 F.2d 47, 50 (8th Cir.1984), *cert. denied,* 471 U.S. 1054, 105 S.Ct. 2116, 85 L.Ed.2d 480 (1985); *Dunlop v. City Elec., Inc.,* 527 F.2d 394, 398 (5th Cir.1976). Plaintiffs' donning and doffing of job-related protective gear satisfies *Steiner*'s bipartite "integral and indispensable" test.

First, because the donning and doffing of this gear on the Pasco plant's "premises is required by law, by rules of [IBP], [and] by the nature of the work," *see* 29 C.F.R. § 790.8(c) n.65 (1999), this donning and doffing is "necessary" to the

"principal" work performed. From sanitary aprons to metal-mesh gear, IBP "by rule[ ]," *id.*, mandates the donning and doffing of clothes and gear at various intervals throughout the workday, requiring employees to wait for and to retrieve that gear in particular areas at particular times on the Pasco plant's premises. *See Steiner,* 350 U.S. at 256, 76 S.Ct. 330. United States Department of Agriculture sanitation standards and Occupational Safety and Health Administration (hereinafter "OSHA") industry standards bolster this "by rule" conclusion, demanding maintenance of sanitary conditions, 9 C.F.R. § 308.3, and the provision of protective equipment at the Pasco plant "wherever[ ][ ] necessary by reason of hazards or processes of [work] environment." 29 C.F.R. § 1910.132(a) (1999).

Second, it is beyond cavil that the donning, doffing, washing, and retrieving of protective gear is, at both broad and basic levels, done for the benefit of IBP. *See generally United Transp. Union Local 1745 v. City of Albuquerque,* 178 F.3d 1109, 1116 (10th Cir.1999). These plaintiff-performed activities allow IBP to satisfy its requirements under the law, *see* 9 C.F.R. § 308.3 (1999); 29 C.F.R. § 1910.132(a) (1999), and these activities prevent unnecessary workplace injury and contamination, both of which would inevitably impede IBP's "disassembly" process. Under *Steiner,* plaintiffs' donning, doffing, and cleaning activities are "integral and indispensable" to Pasco's "principal" activity.

This "integral and indispensable" conclusion extends to donning, doffing, and cleaning of non-unique gear (e.g., hardhats) and unique gear (e.g., Kevlar gloves) alike. Little time may be required to don safety glasses and the use of safety goggles is undoubtedly pervasive in industrial work. But ease of donning and ubiquity of use do not make the donning of such equipment any less "integral and indispensable" as that term is defined in *Steiner.* Safety goggles are, like metal-mesh leggings, required by IBP, and

they are, like metal-mesh leggings, necessary to the performance of the principal work. Both are "integral and indispensable" under *Steiner*'s exception to the Portal-to-Portal Act's bar to compensation of preliminary or postliminary activity.

However, we agree with the district court's alternative conclusion as to why the time spent donning and doffing non-unique protective gear such as hardhats and safety goggles is not compensable: The time it takes to perform these tasks vis-a-vis non-unique protective gear is *de minimis* as a matter of law. "As a general rule," we have noted, "employees cannot recover for otherwise compensable time if it is *de minimis.*" *Lindow v. United States,* 738 F.2d 1057, 1061-62 (9th Cir.1984). "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours," the Supreme Court has observed, "such trifles may be disregarded[, for] [s]plit-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA]." *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). As the Tenth Circuit posited in an alternative conclusion in *Reich,* time spent donning and doffing non-unique protective gear, "although essential to the job[ ] and required by the employer," is at once so insubstantial and so difficult to monitor that it "is *de minimis* as a matter of law." 38 F.3d at 1126 & n. 1.

We agree with this conclusion, both as a matter of logic and as a matter of law. While we do not suggest that the donning of such gear is "trifl[ing]," *see Mt. Clemens,* 328 U.S. at 692, 66 S.Ct. 1187, we do believe that neither FLSA policy nor "the actualities" of plaintiffs' working conditions justify compensation for the time spent performing these tasks. Accordingly, donning and doffing of all protective gear is integral and indispensable to "the principal activities for which [the plaintiffs] are employed," *Steiner,* 350 U.S. at

256, 76 S.Ct. 330, and generally compensable. However, the specific tasks of donning and doffing of non-unique protective gear such as hardhats and safety goggles is noncompensable as *de minimis*. *Lindow,* 738 F.2d at 1061.

In sum, we agree with the district court's conclusion, but for different reasons in part. In this context, "donning and doffing" and "waiting and walking" constitute compensable work activities except for the *de minimis* time associated with the donning and doffing of non-unique protective gear.

III

The FLSA contains an exception for "any time spent in changing clothes" that was excluded from compensation under "the express terms of or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(*o*) (1999) (hereinafter "§ 3(*o*)"). IBP argues that, even if compensable in a general sense, the time employees spend donning and doffing protective gear is non-compensable under the "changing clothes or washing" exclusion.

Section 3(*o*) reads in pertinent part:

> *Hours Worked.*—In determining for the purposes of sections 206 and 207 . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Id.

Distilled to its essence, this case requires us to decide whether putting on and taking off protective gear constitutes "changing clothes" as that phrase is used in the statute. Neither § 3(*o*) nor its legislative history defines the phrase,

and no case law assesses the precise question we address here. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200, 203 (5th Cir.1999) (noting that plaintiffs raised a similar § 3(*o*) safety gear claim but not reaching the issue). In light of this doctrinal, statutory, and legislative lacunae, we give the relevant language its "ordinary, contemporary, common meaning." *United States v. Akintobi,* 159 F.3d 401, 403 (9th Cir.1998) (internal quotation marks omitted) (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)).

The parties posit various dictionary definitions and regulatory references, mostly confined to discussing the etymology of the word "clothes" and, in particular, its commonly understood meaning during the year in which § 3(*o*) was adopted. IBP argues that "clothes" must mean "whatever is worn as covering for the human body," citing *Webster's New International Dictionary of the English Language* 507 (2d ed. unabridged 1939). IBP's construction would embrace any conceivable matter that might adorn the human body, including metal-mesh leggings, armor, spacesuits, riot gear, or mascot costumes. Citing the same dictionary source, plaintiffs contend that the meaning of the word is limited to covering worn "for decency or comfort." *Id.*

Viewed in statutory context, it is evident that the phrase "changing clothes" was not employed in the expansive fashion urged by IBP. First, FLSA exemptions, the Supreme Court has long counseled, "are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960) (citing *Mitchell v. Kentucky Fin. Co.,* 359 U.S. 290, 295, 79 S.Ct. 756, 3 L.Ed.2d 815 (1959)); *see also Auer v. Robbins,* 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Following the Supreme Court's lead, we have also read FLSA exemptions—such as § 3(*o*)—tightly, refusing to

apply FLSA exemptions "except [in contexts] *plainly and unmistakably* within the[ ] [given exemption's] terms and spirit." *Klem v. County of Santa Clara,* 208 F.3d 1085, 1089 (9th Cir.2000) (internal punctuation omitted; emphasis added); *see also Do v. Ocean Peace, Inc.,* 279 F.3d 688, 691 (9th Cir.2002); *Dole v. W. Extension Irr. Dist.,* 909 F.2d 349, 351 (9th Cir.1990). The protective gear at issue does not "plainly and unmistakably" fit within § 3(*o*)'s "clothing" term. Absent such a plain and clear § 3(*o*) fit, *Arnold* requires that we construe § 3(*o*)'s against the employer seeking to assert it. 361 U.S. at 392, 80 S.Ct. 453. Thus, the exemption must be construed against IBP.

Second, and perhaps more importantly, specialized protective gear is different in kind from typical clothing. The admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit. Rather, personal protective equipment generally refers to materials worn by an individual to provide a barrier against exposure to workplace hazards. OSHA has recognized the difference in its regulations defining "personal protective equipment":

> Personal Protective Equipment is specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (e.g. uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment.

29 C.F.R. § 1910.1030(b) (1999).

Of course, this OSHA definition was promulgated in a different context. Nonetheless, it provides a useful analytic distinction.[8] It also underscores the fact that, from both a

[8] In the context of § 3(*o*), the distinction makes particular sense because the section makes the time spent "changing clothes" the proper subject of collective bargaining, whereas it would not be in the interest of public policy to allow disincentives for employers and employees to use government-mandated personal protective equipment.

regulatory and common sense perspective, "changing clothes" means something different from "donning required specialized personal protective equipment." In short, the district court correctly interpreted the "changing clothes" exception in § 3(*o*) as not including the time spent putting on personal protective equipment.[9]

IV

IBP also disputes the district court's view of the compensable work day. It claims that the district court erred in determining that the compensable work day began with the first act of compensable work. Specifically, IBP argues that workers should not be paid for the time spent walking to and from the Pasco plant stations after donning personal protective equipment. Under § 4 of the Portal-to-Portal Act, employees receive compensation only for "hours worked," i.e., for work occurring during the "workday." 29 U.S.C. § 254(a) (1999); *see also* S.Rep. No. 80-48, at 48 (1947) (defining "workday" as the period "between the commence-

[9] Appearing as an *amicus curiae,* the United States Secretary of Labor generally agrees with IBP's definition of the "changing clothes" term, asserting that this phrase covers the donning and doffing of the protective gear we address here. In a June 2002 opinion letter, in fact, the administrator of the Department of Labor's Wage and Hour Division stated that § 3(*o*)'s clothing term "includes the protective safety equipment typically worn by meat packing employees." This position directly conflicts with a 1997 opinion letter from the same Division, in which the administrator concluded that the "plain meaning of 'clothes' in section 3(*o*) does not encompass protective safety equipment." A January 15, 2001, letter reaffirmed the 1997 letter's conclusion. As the Supreme Court has directed, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), and we reject the Secretary's new, inconsistent interpretation here.

ment . . . and the termination . . . of the principal activity . . . which such employee was employed to perform"); 29 C.F.R. § 790.6(b) (1999) (noting that the "workday" includes "all time within that period whether or not the employee engages in work throughout all of that period"); *cf. id.* §§ 785.16(a), 785.19 (1999). Under § 4, employees have no right to receive overtime compensation for activities that are "preliminary to or postliminary to [a job's] principal activity or activities," 29 U.S.C. § 254(a) (1999), unless those preliminary or postliminary activities are "integral and indispensable [to][ ] the principal activities for which [the employees] are employed." *Steiner,* 350 U.S. at 256, 76 S.Ct. 330; 29 U.S.C. § 254(a) (1999).

The district court properly reasoned that the workday commenced with the performance of a preliminary activity that was "integral and indispensable" to the work, and the district court also properly determined that any activity occurring thereafter in the scope and course of employment was compensable. Thus, the district court included "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment" in its "compensable" time measure.

Steiner compels this conclusion. *Steiner's* "principal activity" term expressly "embraces all activities . . . integral and indispensable" thereto, preliminary or otherwise, 350 U.S. at 252-53, 76 S.Ct. 330 (internal quotation marks omitted); the retrieval and donning of protective equipment are "integral and indispensable" preliminary activities, and, as such, are "embrace[d]" by plaintiffs' "principal [work] activity." *Id.* All activities performed thereafter—such as "walking"—thus occur during the "principal" workday and are compensable. *Id.; see also* 29 C.F.R. § 790.6(b) (1999).

IBP contends that § 254(a)(1) is a "stand alone" provision excluding from compensability any and all "walking, riding,

or traveling to and from the actual place of performance of the principal activity" without regard for the "principal activity" itself. 29 U.S.C. § 254(a)(1) (1999). However, *Steiner* eschews such a construction and directs us to "embrace" within the "principal activity" all "integral and indispensable" activities thereto. 350 U.S. at 252-53, 76 S.Ct. 330. There is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done.[10] Plaintiffs were required to obtain their protective gear from their lockers and to be present at their work stations as the first piece of meat arrived; they obviously could not have worked without walking between these places. The district court correctly held that Pasco plant work time was continuous, not the sum of discrete periods.

V

IBP contends that it is shielded from liability by FLSA's good faith defense provisions. *See* 29 U.S.C. §§ 259, 260 (1999). One of these provisions, § 259, "was designed to protect employers from liability if they took certain actions on the basis of an interpretation of the law by a government agency, even if the agency's interpretation later turned out to be wrong." *EEOC v. Home Ins. Co.,* 672 F.2d 252, 263 (2d Cir.1982). In pertinent part, § 259 reads:

> [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the [FLSA] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative

[10] *But see Tum v. Barber Foods, Inc.,* 331 F.3d 1 (1st Cir.2003) (holding under the facts of that case that such activity was not compensable as part of the workday).

> regulation, order, ruling, approval, or interpretation, of [the relevant USDOL administrator], or any administrative practice or enforcement policy of such agency. . . .

29 U.S.C. § 259(a) (1999).

To be insulated from liability under § 259's good faith exception, an employer must "show it acted in (1) good faith, (2) conformity with, and (3) reliance on the DOL's regulations or the Administrator's Opinion Letter." *Frank v. McQuigg,* 950 F.2d 590, 598 (9th Cir.1991). This test has both objective and subjective components, asking how a "reasonably prudent [person] would have acted under the same or similar circumstances" and requiring "that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry." *Id.* (quoting 29 C.F.R. § 790.15(a) (1900)) (internal punctuation omitted). Section 259's test also places on employers "an affirmative duty to inquire about uncertain [FLSA] coverage issues," *see Keeley v. Loomis Fargo & Co.,* 183 F.3d 257, 271 (3d Cir.1999) (citing 29 C.F.R. § 790.15(b)), putting "the risk of a close [good faith] case on the employer." *Reich,* 38 F.3d at 1127; *see also* 29 C.F.R. § 790.15(d) n. 99 (1999) ("It is not intended that this [good faith] defense [ ] apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him.") (quoting 93 Cong. Rec. 4390 (1947)). The employer bears the burden of proof to establish this exception.

IBP argues that its position (1) was supported by the USDOL's 1990s litigation strategy because that litigation focused on non-unionized plants and, in so focusing, demonstrated an administrative practice and enforcement policy treating unionized plants as exempt from such litigation under § 3(*o*), and (2) is bolstered by the supposed good faith it demonstrated in studying and implementing a four-minute compliance plan.

The good faith provisions of § 259 do not embrace IBP's conduct. To come within the exception's reach, an employer's acts "must have been taken in reliance on [an] administrative ruling or interpretation." *Home Ins. Co.,* 672 F.2d at 264. By their plain terms, court decisions, agency litigation positions and self-initiated activities are not "administrative rulings or interpretations." The only agency action upon which IBP relies is the enforcement policy putatively evident in the USDOL's 1990s litigation strategy. Despite IBP's contentions to the contrary, however, *Reich* expressed no opinion regarding the § 3(*o*) "clothing" issue, and, in *Reich,* the Tenth Circuit even hinted that IBP's broad "clothing" definition is untenable. 38 F.3d at 1127. As the district court rightly noted, the *Reich* litigation provided IBP "nothing upon which to rely other than its assumptions about what clothes changing and washing were including under 3(*o*)."

As a rule, moreover, litigating positions are regarded quite differently in the law than an "administrative ruling or interpretation." *See, e.g., Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs,* 151 F.3d 1162, 1165 (9th Cir.1998). There is a sound basis for the distinction. As the Supreme Court has explained, "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Inst. v. Camp,* 401 U.S. 617, 628, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). Administrative agency constructions of governing statutes are the product of deliberation and analysis by the entity charged with application of the statute. Agency positions developed in litigation, by contrast, are not of the same character: they are specifically tailored to help obtain a favorable outcome in a pending controversy in which the agency is involved. Concessions or settlements within the course of the administrative litigation also may be made for a

variety of quite justifiable reasons; however, the contextual underpinnings are dissimilar from agency rule-making.

IBP's four-minute compliance plan, moreover, merely embodies an effort to overcome a settlement impasse in a non-§ 3(*o*) context, offering no conclusion regarding IBP's supposed § 3(*o*) defense or its otherwise FLSA-violative conduct. Under the facts presented by this case, the district court did not err in rejecting IBP's good faith theory.

VI

If a particular employer's conduct embodies "willful violation" of FLSA, 29 U.S.C. § 255(a) permits extension of the FLSA's standard two-year statute of limitations to a three-year period. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); *see* 29 U.S.C. § 255(a) (1999). The determination of willfulness is a mixed question of law and fact, *see Reich v. Monfort,* 144 F.3d 1329, 1334 (10th Cir.1998), and we review mixed questions *de novo* and the factual findings underpinning the determination for clear error. *See Rios v. Rocha,* 299 F.3d 796, 799 n. 4 (2002). The district court did not err in applying § 255's three-year statute of limitations to plaintiffs' FLSA claims. *Cf. Reich v. Monfort,* 144 F.3d at 1334-35.

For § 255's extension to obtain, an employer need not knowingly have violated the FLSA; rather, the three-year term can apply where an employer disregarded the very "possibility" that it was violating the statute, *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141 (2d Cir.1999), although we will not presume that conduct was willful in the absence of evidence. *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 356 (5th Cir.1990).

To prove a particular FLSA violation willful under § 255, the Supreme Court has, in general, required evidence of an employer's "kn[owing] or [ ] reckless disregard for the matter of whether its conduct was prohibited by the statute."

Richland Shoe, 486 U.S. at 133, 108 S.Ct. 1677 (citing *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125-30, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985)). We agree with the district court and conclude that "the proof demonstrate[s] [that IBP] recklessly disregarded *the possibility* that [it] was violating the FLSA." *Herman,* 172 F.3d at 141 (emphasis added).

An examination of the record verifies the propriety of the district court's conclusion. IBP was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them. To the contrary, IBP's actions may more properly be characterized as attempts to evade compliance, or to minimize the actions necessary to achieve compliance.[11] IBP "could easily have inquired into" the meaning of the relevant FLSA terms and the type of steps necessary to comply therewith. *Herman,* 172 F.3d at 142. It failed to do so. The district court appropriately applied § 255's three-year statute of limitations to IBP's willful conduct.

VII

The district court did not err in awarding liquidated damages under the FLSA, a decision we review for abuse of discretion. *See Local 246 Util. Workers Union v. S. Cal. Edison Co.,* 83 F.3d 292, 298 (9th Cir.1996). For violations of the FLSA's minimum and overtime wage provisions, employers "shall be liable to the . . . employees affected in the amount of . . . overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1999); *see Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 583-84, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) (observing that FLSA liquidated damages are not

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[11] Contrary to IBP's assertion, *Service Employees International Union Local 102 v. County of San Diego,* 60 F.3d 1346 (9th Cir.1994), is inapposite because the record in that case did not reflect any knowing or reckless conduct.

penalties exacted by law, but, rather, compensation to the employee occasioned by the delay in receiving wages due). Under 29 U.S.C. § 260, courts need not award liquidated damages in every instance; instead, courts retain discretion to withhold a liquidated damages award, or to award less than the statutory liquidated damages total, where an employer shows that, "despite the failure to pay appropriate wages, the employer acted in subjective 'good faith' and had objectively 'reasonable grounds' for believing that the acts or omissions giving rise to the failure did not violate the FLSA." *Herman,* 172 F.3d at 142; *see* 29 C.F.R. § 790.17(i) n.110 (1999) (observing that an employer's inability to satisfy § 259 does not preclude a court from finding that the employer met § 260's terms).[12]

To satisfy § 260, a FLSA-liable employer bears the "difficult" burden of proving both subjective good faith and objective reasonableness, "with double damages being the norm and single damages the exception." *Herman,* 172 F.3d at 142 (citing *Reich v. S. New Eng. Telecomm. Corp.,* 121 F.3d 58, 71 (2d Cir.1997)); *see also Dole v. Elliott Travel & Tours,* 942 F.2d 962, 968 (6th Cir.1991). Where the employer "fails to carry that burden," we have noted, "liquidated damages are mandatory." *Local 246,* 83 F.3d at 297 (citations omitted).

IBP "failed to take the steps necessary to ensure[its] [ ] practices complied with [FLSA]." *Herman,* 172 F.3d at 142.

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[12] Section 260 provides in relevant part:

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the [FLSA], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof. . . .

29 U.S.C. § 260 (1999).

Mistaking ex post explanation and justification for the necessary affirmative "steps" to ensure compliance, IBP offers no evidence to show that it actively endeavored to ensure such compliance. Instead, it reiterates the value of its read of *Reich,* of USDOL litigation strategy, and of its four-minute compliance plan. IBP's efforts do not constitute evidence of taking the steps necessary to ensure FLSA compliance, and, without such evidence, we cannot say that the district court abused its discretion in awarding liquidated damages. *See Cox,* 919 F.2d at 357 ("[Even] [a] finding that the employer did not act willfully does not preclude an award of liquidated damages.") (citation omitted).

VIII

The district court rejected IBP's contention[13] that it was exempt from the State of Washington's overtime wage provisions[14] because it fell within the "agricultural worker" exemption to those provisions, which provides that the overtime provisions do not apply to:

> individual[s] employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including rais-

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[13] Plaintiffs contend that IBP has waived this issue by raising it only in a pretrial motion for summary judgment. In generally, we will not review on appeal from a final judgment on the merits issues raised only on summary judgment, *see Locricchio v. Legal Services Corp.,* 833 F.2d 1352, 1359 (9th Cir.1987), but there is an exception to this rule where, as here, judgment was entered after a bench trial and the issue on appeal is one purely of law.

[14] Washington's baseline overtime-wage provision, Wash. Rev.Code § 49.46.130 (1999), reads in pertinent part: "[N]o employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

> ing, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. . . .

Wash. Rev.Code § 49.46.130(2)(g) (1999).

As the district court observed, "[t]his subsection only applies to farm employment, and under no construction could IBP's plant be deemed a farm." However, the district court acknowledged that some of the language in the subsection could be subject to a broader construction. However, given the statutory context, the consistent interpretations of the section by the Washington Department of Labor and Industries ("WDLI"), and Washington case law, the district court concluded that the agricultural exemption did not apply to the Pasco plant workers. Rather, the district court concluded that, for purposes of applying the exemption, "[t]he bright line is when an agricultural product is *first* marketed, *i.e.,* conveyed by someone who raised it, to someone who did not." (Emphasis in district court order). Given the statutory and regulatory context, as well as the principles of statutory construction governing this area of law announced by the Washington Supreme Court, the district court did not err in assessing how the Washington Supreme Court would decide the issue.

Under Washington law, statutory "meaning is [to be] discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wash.2d 1, 43 P.3d 4, 10 (2002) (En Banc). In particular, the Washington Supreme Court has directed courts construing the WMWA to heed the "terms and spirit" of the Act overall and of the individual exemption at issue. *Drinkwitz v. Alliant Techsystems, Inc.,* 140 Wash.2d 291, 996 P.2d 582, 587 (2000). The "spirit" of Washington's labor code is plainly employee-protective. Washington's "long and proud history of being a pioneer in the protection of employee rights," *id.* at 586, has, through the years, manifest in "a strong policy in favor of payment of wages due employees [and in] a comprehensive [statutory] scheme to ensure [such] payment." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,* 146 Wash.2d 29, 42 P.3d 1265, 1267 (2002) (second alteration in original; internal quotation marks omitted). The "spirit" of Revised Code of Washington § 49.46.130(2)(g), in turn, is substantially narrower than IBP suggests, aiming to exclude from WMWA's protections only those individuals employed in agriculture or horticulture during the relatively short harvest season. As in the FLSA context, we must construe exemptions to the WMWA narrowly such that only contexts "plainly and unmistakably consistent with the terms and spirit of the legislation" fit therein. *Id.* The individual plaintiffs do not "plainly and unmistakably" fall within § 49.46.130(2)(g)'s ambit.

To the extent that the statute contains ambiguity, we agree with the district court that the Washington Supreme Court would likely afford deference to the state agency's interpretation. Under Washington law, deference is owed the state agency interpretation of a state statute that the agency enforces, "if the law being interpreted is within [that] agency's expertise." *Budget Rent A Car Corp. v. Wash. Dep't of Licensing,* 144 Wash.2d 889, 31 P.3d 1174, 1180

(2001) (En Banc). In this case, the district court attached significance to the WDLI policy that the agricultural worker exemption does not apply to employees in commercial processing of any agricultural commodities grown or raised by another. Several WDLI officials testified as to this policy, and a 1997 enforcement letter from WDLI declares that the statutory exemption "should be strictly and narrowly construed to exempt" only workers performing labor "immediately necessary to complete the successful operation of the agricultural/horticultural enterprise." Although this policy interpretation does not bind us, it provides an additional persuasive indication of how the Washington Supreme Court likely would decide the question.

Thus, in view of the principles of statutory construction applicable under Washington law, the district court did not err in determining that the Washington Supreme Court would likely hold that the agricultural exemption is inapplicable to the IBP packing plant employees.[15]

IX

The Washington Minimum Wage Act, like the FLSA, requires employers to compensate employees at, at least, a minimum wage rate. *See* Wash. Rev.Code § 49.46.020 (1999). Some courts have held that, under the FLSA, an employee's right to recover minimum wage accrues each workweek, not by individual hour. *See Dove v. Coupe*, 759 F.2d 167, 172 (D.C.Cir.1985); *see also* 29 U.S.C. § 206(a) (1999) ("Every employer shall pay [a minimum wage] to each of his employees who in any workweek is engaged in

[15] We need not address whether federal law preempts application of Washington state law in this case, for IBP did not properly raise this preemption argument on appeal. *See Devereaux v. Abbey*, 263 F.3d 1070, 1079 (9th Cir.2001) ("As a general matter, '[w]e review only issues which are argued specifically and distinctly in a party's opening brief.'") (citation omitted; alteration in original).

commerce or in the production of goods for commerce. . . ."). We must determine whether the WMWA similarly provides only a right to minimum wages based on a workweek standard or whether, in contrast, employees retain a per-hour right to minimum wage under Washington law.

Washington state courts have yet to determine whether hourly-employees, like plaintiffs, have a per-hour or a work-week right to minimum wage. *See Seattle Prof'l Eng'g Employees Ass'n ("SPEEA") v. Boeing Co.*, 92 Wash.App. 214, 963 P.2d 204, 225 (1998) (expressly refusing to "address whether compliance with the WMWA should be evaluated on an hourly or workweek basis"), *as amended by* 92 Wash.App. 214, 963 P.2d 204 (1998) (same). The district court concluded that Washington courts were "likely" to adopt the per-hour standard for hourly employees. We agree.

The district court relied on three bases for its conclusion. First, the WMWA omits the phrase "in any workweek," which is contained in the relevant portion of the FLSA. Second, the district court drew significance from the fact that, in *SPEEA*, the trial court used a per-hour measure and the Washington Supreme Court refused to criticize this aspect of the trial court's methodology. Third, it deferred to the WDLI interpretation that, for hourly workers, the WDLI employs the per-hour standard for determining minimum wage compliance.

We believe the district court's analysis is persuasive. Regulations interpreting the WMWA are similarly telling in this regard. Repeatedly listing "hourly" employment as a separate employment type, these regulations permit use of the work-week measure only for particular employment categories. *See, e.g.*, Wash. Admin. Code § 296-128-550 (1999); *id.* § 296-126-021 (1999); *id.* § 296-126-010 (1999). Were the Washington legislature disposed to apply the workweek measure to hourly employees, it could have done so as expressly as it did vis-a-vis other employment types.

And were the workweek measure to be generally and necessarily applicable, the Washington legislature's specification of the workweek standard for, e.g., commissioned employees would be both extraneous and redundant.

Given this statutory and regulatory background, the district court quite reasonably predicted that the Washington Supreme Court would construe the WMWA as using a per-hour standard for hourly employees.

X

In unequivocal terms, Wash. Admin. Code § 296-126-092 requires that "[e]mployees shall be allowed a meal period of at least 30 minutes." Wash. Admin. Code § 296-126-092(1) (1999). Such "meal period[s]" are to "commence[ ] no less than two hours nor more than five hours from the beginning of [an employee's] shift," and such meal periods "shall be" on the employer's time—i.e., shall be paid—"when the employee is required by the employer to remain on duty on the premises or at the prescribed work site in the interest of the employer." *Id.*

WDLI, appearing as an *amicus curiae,* asserts that Wash. Admin.Code § 296-126-092 evinces a "clear, 'bright-line' standard": it requires employers to provide meal-breaks of "at least 30 minutes," and it demands that employers interrupting meal-breaks "pay for the entire meal break, regardless of the length and the number of the work-interruptions or curtailments." *Cf. Brennan v. Elmer's Disposal Serv., Inc.,* 510 F.2d 84, 88 (9th Cir.1975) ("An employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work."). The district court construed this provision as compensating a particular employee only for minutes lost if that employee lost less than or as many as ten minutes of his or her meal-break time to work duty, and awarding compensation for the full thirty-minute term only where an employee lost more than ten

minutes of his or her meal-break time to work duty. *Cf.* 29 C.F.R. §§ 785.18 & 785.19 (1999) (permitting employers to reduce meal-breaks to twenty minutes under "special conditions"; specifying the thirty-minute rule as one that need only "ordinarily" be followed); *S. New Eng. Telecomm. Corp.,* 121 F.3d at 63-65 (applying § 785.19 in a "practical manner"); *see also Roy v. County of Lexington,* 141 F.3d 533, 544-45 (4th Cir.1998) (adopting a "predominant benefit" test in assessing meal-break claims under FLSA).

Although perhaps consistent with the FLSA, the district court's interpretation conflicts with the terms of the mandatory language of Wash. Admin. Code § 296-126-092. Unlike the correlative FLSA provisions, which permit truncation of the thirty-minute period in certain contexts, *see* 29 C.F.R. §§ 785.18 & 785.19 (1999), neither Wash. Admin. Code § 296-126-092 nor its interpretative guides permit any mitigation of the section's mandatory thirty-minute duty-free directive. *See* Wash. Admin. Code § 296-126-092(1) (expressly noting that employees "shall be allowed" a thirty-minute meal-break); *see also Wash. State Liquor Control Bd. v. Wash. State Pers. Bd.,* 88 Wash.2d 368, 561 P.2d 195, 200 (1977) (En Banc) ("[A]s a general rule, the use of the word 'shall' in a statute is imperative and operates to create a duty. . . ."). Without reference to or acceptance of the kind of "special circumstances" posited in 29 C.F.R. § 785.19, Wash. Admin. Code § 296-126-092(1) requires "a meal period of at least 30 minutes." *Id.* No intrusions on this thirty-minute period are condoned or even acknowledged; indeed, WDLI's most recent evaluation of this provision notes that "[i]f the meal period should be interrupted due to the employee's performing a task . . . [t]he entire meal period must be paid without regard to the number of interruptions." Wash. State Dep't of Labor and Indus., Administrative Policy ES.C.6 (2002), *available at http://www.lni.wa.gov/scs/workstandards/policies /esc6.htm.*

The plain words of the statute buttress WDLI's interpretation, and we owe WDLI's construction deference under Washington law. *Wash. State Liquor Control Bd.*, 561 P.2d at 200 ("The construction of a rule by the agency which promulgated it is entitled to great weight."); *Drinkwitz*, 996 P.2d at 591 (discussing Washington's "long and proud history of being a pioneer in the protection of employee rights"). Under Wash. Admin. Code § 296-126-092, plaintiffs are owed compensation for the full thirty-minute period where IBP has intruded upon or infringed the mandatory thirty-minute term to any extent. We thus reverse the district court's decision to bifurcate its Wash. Admin. Code § 296-126-092 award, and we remand for recalculation of damages consistent with this full thirty-minute remuneration approach.

XI

As the Supreme Court noted in *Mt. Clemens*, a court may "award damages to [an] employee, even though the [award] be only approximate." 328 U.S. at 688, 66 S.Ct. 1187. Heeding *Mt. Clemens* "approximate" term, the Tenth Circuit, in *Reich*, affirmed a damage award based on "reasonable time" measures where "differences in personal routines occurred at the end of [a] shift." 38 F.3d at 1127.

Charting a similar course, the district court attached "the compensable time for each activity [ ] [to] the basis of a reasonable time, rather than the actual time required for each activity." The use of reasonable time in this instance was within the district court's discretion. *Mt. Clemens*, 328 U.S. at 687-88, 66 S.Ct. 1187; *see Reich*, 38 F.3d at 1127; *Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 420 (5th Cir.1975).

First, we respectfully disagree with the plaintiffs' read of the district court's damage and time analyses. The district court did not make "actual" time findings only to disregard them, and district court did not rely on a misconception of the concept of "work." We do not disagree with plaintiffs, of

course, that the definition of "work" is not fixed, in most instances, to an objective measure of "reasonableness." *See Brock v. City of Cincinnati*, 236 F.3d 793, 802-03 (6th Cir.2001); *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 522-24 (2d Cir.1998). But we cannot agree with the plaintiffs' use of this thesis here. In arguing that the district court misunderstood "work," plaintiffs conflate a determination that a "reasonable" time sufficed for damage calculation where myriad internal "differences" permeated a class-wide award with a determination that a specific plaintiff's "work" was not itself "reasonable." The district court made the former, but it did not make the latter; that is, the district court did not conclude that any particular plaintiff's "work" was unreasonable or inherently non-compensable. *Cf. Holzapfel*, 145 F.3d at 524. Rather, the district court adopted—as the Tenth Circuit did in *Reich*—a compensation measure based on a "reasonable" quantification of plaintiffs' work time, thereby avoiding countless individual plaintiff-specific quagmires while directing the parties to individualize the damage measure to the extent possible nevertheless.

Second, the district court's approach is consistent with our settled case law. We have approved "approximate[d]" awards where plaintiffs can establish, to an imperfect degree of certainty, that they "ha[ve] performed work and ha[ve] not been paid in accordance with the [FLSA]." *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir.1986) (internal quotation marks omitted; final alteration in original). In such instances, "[t]he only uncertainty is the *amount* of damage," not the fact that damages are due. *Id.* Where an "approximate [ ] award based on reasonable inferences" forms a satisfactory surrogate for unquantified and unrecorded "actual" times, an approximated award is permissible. *Id.* at 1449. The district court's compensation framework adheres to this test.

We recognize, of course, that approximated time and reasonable time are not synonymous categories. As the

courts in *Holzapfel* and *Brock* suggest, in certain contexts, "individual traits and needs of [each employee] [may] preclude any easy determination as to what is a 'reasonable time.'" *Holzapfel,* 145 F.3d at 526; *see Brock,* 236 F.3d at 802. In contexts in which work tasks are not uniform and are less subject to dilatoriness, that which is "approximate" may not always be "reasonable." But the nature of the work at issue in this case, and, notably, the relatively uniform tasks performed by plaintiffs, conduce to the kind of analysis performed by the district court, and the district court did not abuse its discretion in its damage calculation.

XII

IBP contends that the district court erred in holding that there was an implied cause of action for violation of Wash. Admin. Code § 296-126-092 in Wash. Rev.Code § 49.12 (1999). However, after briefing of this appeal, the Washington Supreme Court held that an implied private right of action did exist under the statute, thus foreclosing this argument. *See Wingert,* 50 P.3d at 261.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the judgment of the district court. We remand for recalculation of damages. Each party to bear their own costs.

AFFIRMED in part; REVERSED in part; REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed Sep 14, 2001]

No. CT-98-5005-RHW

GABRIEL ALVAREZ, *et. al.,*
Plaintiffs,

v.

IBP, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial to the bench commenced on September 27, 2000 and concluded on October 27, 2000. A hearing on objections to the Court's proposed findings and conclusions was held on July 27, 2001. An order on objections was issued on August 2, 2001. A hearing on the rest break claim was held August 29, 2001. Throughout this action, Plaintiffs were represented by William Rutzick, Kathryn Goater, and David Mark; Defendant by Douglas Smith, Barbara Duffy, Nancy Anderson, and Sarah Haushild. This constitutes the Court's final findings and conclusions required by Federal Rule of Civil Procedure 52(a).

BACKGROUND

This is a class action brought under the Fair Labor Standards Act ("FLSA") and related Washington state laws by production line workers at IBP's Pasco, Washington plant seeking compensation for unpaid activities prior to the arrival of the first piece of meat, during the unpaid "30-minute" meal break, and after the last piece of meat.

A. The Pasco Plant

IBP owns and operates a beef slaughter and processing plant in Pasco, Washington ("the Pasco Plant"). The class members engaged in production line work in two different sections of IBP's Pasco Plant: the Slaughter and Processing divisions. Cattle are slaughtered and processed into carcasses and other products while moving along a series of consecutive chains in the Slaughter Division. After that, the carcasses are stored in a cooler for at least 24 hours, then wend their way along a chain and moving belts through the Processing Division, where they are further processed. Each worker on the processing line typically performs one or two discrete operations in a disassembly line process.

The Slaughter Division runs one shift beginning operations at 6:30 a.m. A standard slaughter division crew is approximately 178 employees, with approximately 113 job classifications[1]. The Processing Division runs an A shift that starts at 5:45 a.m., and a B shift that starts at 3:15 p.m. These shifts have a combined crew of approximately 800 line workers, with approximately 145 job classifications. On the processing line there are eight processing belts, each dropping carcasses onto a line. Each line is a separate department, with 25-40 employees working side by side. At the end of each line are two to five packaging department employees, who bag pieces of meat. There also are two departments located on the side of the processing floor: the hamburger department and the bones department.

B. Gang Time Pay

Employees at the Pasco plant are paid on a gang time basis, which means pay is based on the time that employees are

[1] The job classifications focus on the particular cut the employee makes. Many classifications are staffed with multiple workers, and workers who work alongside each other on the same line, using virtually the same equipment, will have different classifications.

cutting and bagging meat. Pay begins with the first piece of meat and ends with the last piece of meat. IBP posts the scheduled start of the shift. However, it does not post the times that workers are required to be at their specific lines and work locations, which vary depending on the work location. IBP superintendents did not know what times employees were required to be at specific work locations. Employees expressed confusion about start times. Employees clock-in and out using a swipe card at the beginning and end of each day. The system records the clock-in and out times, but these are not used to determine pay.

Since October 1995, slaughter division employees have been eligible for "sunshine pay" for the "time by which a shift's scheduled hours exceed the killout time of the scheduled number of head." Sunshine pay "is possible where downtime is minimized during the shift and/or where chain speed is increased." (Exhibit 73a.) Sunshine pay is extra compensation for working more efficiently and more quickly.

C. Bargaining History

The majority of the workers at IBP's Pasco plant are Hispanic and are represented by Teamsters Local Union No. 556, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("the Teamsters"), under a series of collective bargaining agreements between the Teamsters and IBP. The 1976 collective bargaining agreement between Local 556 and Columbia Foods included 30 minutes per week for "clothes changing." (Ex 216.) IBP purchased the Pasco operation from Columbia Foods in the late 1970's and a similar provision was included in the first collective bargaining agreement between IBP and Local 556 in 1979. (Ex. 217.) In 1982, "clothes changing" time was removed from the collective bargaining agreement. (Ex. 218.) In 1982, 1986, and 1992, "clothes changing time" was negotiated and left out. In 1999,

clothes changing and clean-up time were negotiated and left out again.

D. DOL Litigation

IBP also operates a number of non-union plants. The United States Department of Labor ("DOL") was involved in ongoing litigation involving 11 of IBP's non-union plants. The courts decided the damages and injunction issues in *Reich v. IBP*, 3 Wage & Hour Cases 2d 324 (D. Kan. 1996); 3 Wage & Hour Cases 2d 863 (D. Kan. 1996). (Ex. 221.) IBP was held liable for 14 minutes per shift back pay to knife users and was permanently enjoined to comply with the FLSA at its non-union plants. The courts also held IBP liable for unpaid pre-shift and post-shift donning, doffing, and cleaning of special packinghouse industry safety equipment and for the time between waiting to pick up and return knives, which were held to be the first and last activities of the work day. *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994).

In December 1997, IBP received a copy of a 29 U.S.C. § 203(o)[2] opinion letter issued by the Administrator of the Wage and Hour Division of the United States Department of Labor. The Administrator concluded that donning and doffing packinghouse protective equipment was not § 3(o) "changing clothes," because this type of equipment was not clothing. He also cited language from the legislative history indicating that Congress intended § 3(o) "washing" to refer to washing the person, not equipment washing. (Ex. 64.) In April 1998, the Department of Labor filed a second suit seeking back pay for

[2] 29 U.S.C. § 203(o) creates an exclusion from compensable time for time "spent in changing clothes or washing at the beginning or end of each work day which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."

post-*Reich* violations at IBP's non-union plants. *Herman v. IBP, Inc.*, 98-CV-2163-JWL (D. Kan.) (Ex 237.) This is when IBP began to pay 4 minutes per day for pre- and post-shift activity at its non-union plants.[3]

Prior to July 1998, IBP scheduled 8-hour shifts, plus a 30-minute unpaid meal break at the Pasco Plant. In July 1998, IBP started paying production line workers 4 minutes of "clothes" time and reduced the shift to 7 hours and 56 minutes. In the fall of 1999, the company reduced the shift to 7 hours and 51 minutes, plus a 30-minute meal break and 4 minutes of "clothes changing time."

E. Pre- and Post-Shift Activities

Employees are required to wear a variety of outer garments and personal protective equipment. IBP documents describe "Minimum Safety Equipment" requirements. (Ex. 90-93.) All employees are required to wear a sanitary outer garment provided by IBP. IBP launders the outer garments each night. All employees are required to use a plastic hard hat, a hair net, and ear plugs. All employees, except those in the slaughter division gutter job, are required to wear either safety glasses or a face shield. The vast majority wear safety glasses. IBP requires employees to clean and store equipment and tools in a company-provided locker at the end of each shift. There are four locker rooms, one each for men and women in the slaughter division and in the processing division. "Knife users" are required to wear a variety of protective equipment for the hands, arms, torsos, and legs. This includes "wire mesh," which is chain-linked metal. Mesh items include aprons, aprons with leggings, vests,

[3] IBP claimed to have reduced the compensable time from 14 minutes to 4 minutes by moving knife distribution and by installing additional equipment washing sinks to reduce waiting time. In late 1998 and early 1999, IBP and DOL negotiated and agreed to 4 minutes of compensation at the non-union plants for pre- and post-shift activities.

sleeves, and gloves. Employees also use puncture-resistant protective sleeves and Kevlar gloves, also referred to as "can't cut" or "Polar" gloves. Knife users also wear plexiglass arm guards on one or both arms. Employees also wear other gloves. In the processing division, employees wear yellow cotton gloves. These gloves facilitate gripping knives or other tools and provide warmth.[4] Some slaughter division employees also wear yellow cotton gloves. Slaughter division employees typically also wear rubber and/or plastic gloves. These facilitate grip and protect against blood and water saturation. Employees also wear liquid repelling sleeves, aprons, and leggings, including yellow plastic sleeves, clear plastic sleeves, clear plastic leggings, and rubber aprons. Saw operators and some packaging employees also wear these items. Employees also wear safety shoes or boots, which must be wiped off or hosed down after each shift. Many employees also wear weight belts to prevent back injuries. Employees also are assigned various equipment; for example, steels are assigned to employees who use knives.

Slaughter employees begin their day by picking up supplies at the supply room, then go to the locker room, where they retrieve their assigned protective equipment, steels, and tools. Most slaughter employees don most of their safety equipment in the locker room. After leaving the locker room, they proceed toward the slaughter floor. Once on the slaughter floor, many go to the knife room to receive sandpaper for sanding steel. There are four or five knife distribution points on the slaughter floor, although some employees pick up knives at the knife room. Knife users sand their steel, and air knife users wipe and wash grease from the air knife prior to using it. Employees are required to be at their work stations and ready to work on the first cow or meat as it arrives.

[4] The processing floor is between 38 and 42 degrees Fahrenheit.

On the processing side, employees must line up to get their frocks and go to the locker room. They obtain safety equipment and tools, which IBP requires be stored in the lockers, and then proceed to the processing floor. Much of the pre-shift routine for processing surrounds the distribution of glove pins with yellow cotton gloves, and protective sleeves and gloves.

Employees receive a 15-minute paid rest break after 2 hours of line operation, and a 30-minute unpaid meal break after approximately another 2 hours of line operation. Breaks begin when employees receive their last piece of meat and end when employees receive their next piece of meat. During the meal breaks, employees must remove certain equipment to go to the cafeteria or to use the restroom. IBP strongly encourages employees to use the restroom during the unpaid meal break and permits such use during work periods only on an emergency basis. Other workers must do the work of the absent worker, making use of the restroom inconvenient for other workers. A majority of employees use the restroom during the meal break. IBP requires employees to remove most equipment prior to entering the restroom.[5] Workers are required to remove outer garments, gloves, scabbards, and chains prior to entering the cafeteria. IBP requires employees to be back at the work station and ready to work on the first piece of meat with their equipment on at the end of the meal break.

After their last piece of meat, workers must clean their equipment and return their equipment to the supply room and to their lockers. There are wash stations located throughout the slaughter floor. Most workers hose down and scrub aprons, sleeves, rubber gloves, and boots. Knife users return the knives to collection boxes. Workers return soiled protec-

[5] Employees do not have to remove hard hats, hairnets, earplugs, safety glasses, and boots to enter the restroom.

tion gloves and sleeves as well as cotton gloves to the supply window. Processing workers clip their soiled gloves and protective sleeves onto their glove pin and return them. Knife users put the knives in buckets that are passed along the production lines. Washable protective equipment and some tools need to be washed at equipment wash sinks, including scabbards, chains, mesh gloves, steels, plastic sleeves, aprons, meat hooks, scissors, and boots.

CLAIMS AND DEFENSES

A. Uncompensated Activities

This case involves unpaid activities prior to the first piece of meat, during the unpaid "30-minute" meal break and second rest break, and after the last piece of meat, under the FLSA, 29 U.S.C. §§ 206 and 207, and the Washington Minimum Wage Act, RCW 49.46.010 *et seq.*, RCW 49.12 *et seq.*, RCW 49.52 *et. seq.*

Most workers begin the work day in the locker room by donning safety equipment. They then engage in a variety of additional activities prior to the start of the paid work day, such as sanding the steel used by knife users to sharpen knives, retrieving cloth gloves, protective gloves, and protective sleeves that are laundered each night, and various other preparatory activities. During the 30-minute unpaid meal break employees are required to doff and hang up the safety equipment they are wearing before they can begin to use the break as their own time. They also are required to don the equipment and be back at their work stations ready to begin cutting meat at the end of the 30-minute break. After working on their last piece of meat, the workers are on the production floor and are required to wash their equipment and doff and store their equipment upon returning to their lockers.

B. Union Negotiations of Clothes Changing Time

IBP urges that 29 U.S.C. § 203(o) permits private negotiations between unions and meat industry employers as to whether to include such pre- and post-shift activities in their employees' paid work time. There was a provision for clothes changing time in the Collective Bargaining Agreement at IBP's Pasco Plant for the year 1976 and for the years 1979-1982, but such a provision was eliminated in 1982 and renegotiated and left out in 1992. IBP argues that it relied on the collective bargaining agreements in effect at the Pasco Plant during the relevant time periods, which excluded clothes changing time, and that those agreements prevent Plaintiffs from asserting these claims, as the Union had bargained away these rights on behalf of the employees.

C. IBP's Reliance on DOL

IBP was involved in litigation with the Department of Labor ("DOL") regarding similar pre- and post-shift activities at its non-union plants. IBP urges that it relied on DOL's exclusion of union plants in this litigation to conclude that clothes changing time was not compensable at union plants. IBP claims it is entitled to this reliance under 29 U.S.C. § 259(a). As a result of this litigation, IBP came to a negotiated settlement with DOL of 4 minutes for clothes changing time at its non-union plants. IBP argues that when the DOL indicated in December 1997 that clothes changing may be compensable at union plants, IBP, although concluding that the DOL was wrong, changed its policy to comply with IBP's 4-minute compensation policy at non-union plants. Starting on July 30, 1998, IBP began to pay its union employees at the Pasco Plant an extra 4 minutes per day compensation for clothes changing.

D. Other Claims Re: Noncompensability

IBP also claims that these pre- and post-shift activities are not compensable under the Portal to Portal Act, 29 U.S.C.

§ 254(a) because they are not integral and indispensable to the employees' performance of their jobs.

IBP argues further that the meal break time is not compensable because it is primarily for the benefit of the employees.

Finally, as to the state law overtime claims, IBP argues that Washington law is to be interpreted consistently with the FLSA and because, they argue, the pre-and post-shift activities are not compensable under the FLSA, they should not be compensable under Washington law. IBP also argues that the Washington Supreme Court's decision in *Inniss* adopts a weekly standard for minimum wage compliance and, therefore, absolves IBP of overtime liability under state law.

DISCUSSION

I. Jurisdiction

The Court has jurisdiction over the class members' FLSA, 29 U.S.C. §§ 201-219, claims under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

The Court has supplemental jurisdiction over the class members' state law claims under the MWA, RCW chapter 49.46, and related exemplary damage claims under RCW chapter 49.52, pursuant to 29 U.S.C. § 1367.

The class members' employment at the Pasco plant has been part of an enterprise engaged in commerce and in the production of goods for commerce, as these terms are used in Sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206-07, and IBP is, therefore, subject to the overtime provisions of 29 U.S.C. § 207.

IBP is an employer for purposes of RCW chapter 49.46 in that it is a corporation acting as an employer in relation to an employee. *See* RCW 49.46.010(4). IBP is, therefore, subject to the requirements of the MWA, RCW chapter 49.46.

II. The Class

The class has been certified as a §16(b) FLSA, 29 U.S.C. § 216, opt-in class, as follows:

> All IBP processing or slaughtering division employees at defendant's Pasco, Washington plant from June 30, 1995 to [August 24, 1999], but specifically excluding all supervisors, managers, quality control employees, guards, mechanics, laundry room employees, janitors, knife room employees, rendering employees, and packing employees who perform work away from the production lines.

Pretrial Order (Ct. Rec. 102).

The Court finds that the hides division is separate from both the processing and slaughter divisions and, therefore, employees working solely in the hides division are not members of this class. Both the superintendent of the kill floor and the superintendent of "A" shift processing testified that hides is a separate division from processing and slaughter. The hides division is located off the kill floor and the processing floor, and hides employees are not allowed to "bid" on jobs in either processing or slaughter. A hides division employee testified that neither the superintendent of processing nor the superintendent of slaughter was his boss and that he does not work in the slaughter area. The class is comprised of 815 slaughter and process division employees, who opted in pursuant to the procedure stipulated to by the parties and approved by the Court. (Ex. 266, 341, 253(a).)

IBP has requested reconsideration of class certification based on the difficulty in calculating damages. Again, this is based on a misunderstanding of the Court's findings, and an attempt to distort the concept of individualized damages. The Court is requiring individualized damages calculations in an over-abundance of caution to the Defendant. The Court could have determined that the evidence was sufficient to permit a

more generalized damages calculation, but because the evidence and testimony permitted a more discrete determination as to timing by job description, equipment list, and activities testified to, the Court determined that this calculation would lead to a recovery that relates to what work was actually performed. Defendant's objection is denied, based on the findings of adequate representative evidence.

III. Representative Evidence

The use of representative evidence is well accepted for determining liability in FLSA cases. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). The Second Circuit explained the principles of representative evidence in *Reich v. Southern New England Telecomms.*, 121 F.3d 58, 66-67 (2nd Cir. 1997) in the following way:

> When a defendant in a suit for lost wages under the FLSA fails to maintain employment records as required by the Act, an employee . . . may submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred.
>
> . . .
>
> . . . In meeting the burden under *Mt. Clemens*, the Secretary need not present testimony from each underpaid employee; rather it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA. *See Reich v. Southern Maryland Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-2 (3d Cir. 1994).

The burden originally is on the employees to demonstrate with sufficient evidence that the employees have, in fact, performed work for which they were improperly compensated, and to produce sufficient evidence to show the amount and extent of that work "as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687. The burden then shifts to the employer, and if the employer fails to produce

"evidence of the precise amount of work performed or evidence to negative the reasonableness of the inference to be drawn from the employee's evidence . . . . [t]he court may then award damages to the employee[s], even though the result be only approximate." *Mt. Clemens*, 328 U.S. at 687-88.

A. IBP's Records Are Inadequate

The representative evidence standard set forth in *Mt. Clemens* applies here since IBP failed to maintain employment records of pre- and post-shift work, as required by the FLSA. *See Southern New England Telecomms.*, 121 F.3d at 66-67. The testimony was that IBP does not require employees to clock-in before donning protective equipment at the beginning of the day or at the end of lunch breaks, and does not have employees wait until after doffing such equipment to clock-out. While employees do clock-in and out, IBP does not use those records to determine hours worked, nor does IBP require when clock-ins or clock-outs occur. Thus, the clock-ins and clock-outs are not an indication of the precise amount of work performed. Some employees clock-in when they arrive at the plant, while some wait until after they get their equipment to clock-in. IBP documents indicate that employees were informed in July 1998 that they are to clock-in "no more than 7 minutes before your scheduled start time," and to clock-out at the "end of your shift as you leave your work area." (Ex. 76.) This policy ensures that the clock-in and clock-out procedures are not an adequate measure of the time employees spend donning and doffing equipment. Thus, the *Mt. Clemens*' precondition to representative evidence is met in this case.

B. Employee Burden

The burden is on the Plaintiffs to demonstrate with sufficient evidence that the employees have, in fact, performed work for which they were improperly compensated,

and to produce sufficient evidence to show the amount and extent of that work, as a matter of just and reasonable inference. *Mt. Clemens*, 328 U.S. at 687. Employee testimony, documentary evidence, and expert testimony are appropriate methods of making a prima facie showing of a pattern or practice of unpaid time and wages. *See Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir. 1983) *cert. denied* 464 U.S. 850 (1983) (holding "plaintiffs met their burden of proof by demonstrating that they performed work and were not compensated . . ." where 13 plaintiffs testified regarding the hours they and members of their families worked and plaintiffs' statistics expert testified and calculated a minimum and maximum number of hours each plaintiff worked.) *See also Reich v. Waldbaum*, 833 F. Supp. 1037, 1042 (S.D.N.Y. 1993) *rev'd on other grounds*, 52 F.3d 35 (2d Cir. 1995); *Herman v. Davis*, 21 F. Supp. 2d 130, 133 (N.D. N.Y. 1998), *rev'd on other grounds*, 196 F.3d 354 (2d Cir. 1999).

Defendants cite *New England Telecomms.* for the proposition that variation among workers and job positions at IBP's Pasco plant requires Plaintiffs to provide testimony from a plaintiff who has been employed in every position. (Ct. Rec. 552.) However, the court in *New England Telecomms.* held that it was "untroubled by the quantum of representative evidence in this case because the testimony covered each clearly defined category of worker; there was actual consistency among those workers' testimony both within each category and overall . . ." *New England Telecomms.*, 121 F.3d at 67. The Court is similarly untroubled here, based on the combination of employee testimony, documentary evidence, and expert testimony. *See also McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (holding that while the testimony of the five employee witnesses was inconsistent in terms of exact days and hours of overtime, they had established "'as a matter of just and reasonable inference' that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays.") (*internal*

citation omitted); *Donovan v. Bel-Loc Diner*, 780 F.2d 1113, 1116 (4th Cir. 1985) (holding that the inconsistency in the pattern or practice does not make the court's factual determination clearly erroneous).

The employee testimony established that pre- and post-shift and meal-time work activities were unpaid, what activities were being performed during these times, and the time each activity takes to complete. Just over 40 employees of IBP's Pasco Plant testified at trial; 25 employees from the Processing Division testified, and employees from the Slaughter Division testified to over 40 job positions. Each employee testified to their various pre- and post-shift activities, as well as their donning and doffing practices during the 30-minute meal break period. While it is true that employees vary in some of the equipment they are required to don and doff, each employee spent some uncompensated time both pre- and post-shift and during the 30-minute meal break. Most employees share at least some of the required protective equipment and the time ranges for pre-shift protective equipment between processing and slaughter are from 30 to 45 minutes in processing, and from 15 to 45 minutes in slaughter.

Furthermore, even if, as Defendant claims, Plaintiffs were required to produce evidence regarding every position at the Pasco plant, the documentary and expert testimony provide the evidence for jobs not testified to by employees. IBP documents identify what jobs at the Pasco plant require protective equipment. (Ex. 74.) Documents also identify jobs for which protective equipment is not required. (Ex. 75.) Internal documents demonstrate which equipment must be removed prior to employees going to lunch or to break. (Exs. 82 and 83.) Other evidence presented indicated what jobs require which items of personal safety equipment. (Exs. 90-93.) Plaintiffs' expert developed average observed times for most activities performed by employees. (Ex. 1035.) Both

IBP's and Plaintiffs' experts performed auditing exercises for certain activities for each position. (Ex. 358-363.)

Plaintiffs' time-study expert, Dr. Kenneth Mericle, also time-studied a variety of pre-shift, post-shift, and meal-break activities based on repeated observation of these activities in 2 days of plant visits and review of 2 days of videotape taken by Plaintiffs in early 1999. Defendant's expert, Dr. Radwin, criticized Dr. Mericle for not making enough observations of each activity to give estimated times to a 95% confidence interval. However, Dr. Mericle made more observations than IBP in its Pasco plant time-study, made more observations than IBP made of most activities in its non-union plant time-studies combined, made more observations than were made in Dr. Radwin's 3-day aborted study, and made more observations than were made for almost every element in the Dr. Fernandez Report. (Ex. 241.) Dr. Mericle's practice with respect to sample size and calculation of confidence intervals is consistent with the practice and experience of the witnesses called by IBP. For example, Jeffrey Fernandez testified about a time-study he had done at two other IBP plants. Many of his reported times did not meet a 95% confidence interval, and he generally obtained fewer observations than did Dr. Mericle. (Trial Exhibit 241.) IBP's own Pasco time-study, performed by Cody Hostick, did not include a confidence interval calculation, and included many fewer observations than did Dr. Mericle's study. While testimony to a 95% confidence interval study would be desirable from an academic standpoint, and would likely be afforded more weight, the Mericle study was sufficiently detailed and consistent with the Radwin study, such that it would be the type of study relied upon in the industry and is entitled to some evidentiary weight herein. The Court finds the study by Dr. Mericle to be reliable.

The combination of this evidence convinces the Court that employees have, in fact, performed work for which they were

improperly compensated, and that they have produced sufficient evidence to show the amount and extent of that work "as a matter of just and reasonable inference."

C. Employer Rebuttal

Once plaintiffs have established that the employees were performing unpaid work and provided evidence as to the extent and amount of the unpaid work, the burden then shifts to the employer to demonstrate the precise amount of work performed or evidence to "negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687-88.

IBP has failed to rebut the Plaintiffs' evidence that they were not paid for the time they spent in pre- and post-shift activities, and in activities during their meal break. The employee manual for IBP states that employees are to find out their correct starting time from their supervisor. (Ex. 1 page 18.) (*See also* testimony of Barb Salter.) The manual also notes that "[w]ork schedules are posted daily on the bulletin board, and it will be the responsibility of each employee to read." (Ex. 1 page 18.) The testimony and evidence were that the employees arrive up to 40 minutes early to retrieve and don their required equipment. (Testimony of Pedro Galvan Juarez, Modesto Reynada, Amir Mustafic.) The swipe card evidence bolsters this claim.

IV. Statute of Limitation

Under the FLSA, the statute of limitation for willful violations is 3 years. 29 U.S.C. § 255(a). A violation is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

IBP's violations herein were willful. In early 1996, IBP was aware of the meal-break issue, based on Kimbro's review

of the Legal Master Narrative Report. (Kimbro; Exhibit 192.) IBP also knew that in *Reich v. IBF*, the court had determined that donning and doffing activity was work when performed pre-shift and post-shift. Kimbro recklessly assumed that employees spent only 1 or 2 minutes in meal-break donning and doffing, based on a fundamental misunderstanding of company policy requiring doffing and donning to use the restroom. IBP also knew or showed reckless disregard of the FLSA in concluding that § 3(o) excluded union plant compensation for activities such as sanding steels, glove pin distribution, cleaning protective equipment, retrieving tools (such as meat hooks and air knives), and the various types of non-clothing pre-shift and post-shift activities commonly performed by class members. Therefore, the court will apply the 3-year FLSA statute of limitation to Plaintiffs' claims.

V. FLSA Claims

A. Overtime Under the FLSA

Plaintiffs are entitled to recover for unpaid work performed in excess of 40 hours a week. Under the FLSA, work for which the employees must be compensated means "mental or physical exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Tennessee Coal, Iron & R.R. v. Muscoda*, 321 U.S. 590, 598 (1944). "Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer . . . " 29 C.F.R. § 785.7 (citing *Armour & Co. v. Wantock*, 323 U.S. 126 (1944) and *Skidmore v. Swift*, 323 U.S. 134 (1994)). An employer is, thus, liable for all work that it permits, *i.e.*, all work of which it has actual or constructive knowledge. *See, e.g., Forrester v. IGA*, 646 F.2d 413, 414 (9th Cir. 1981). An employer is liable for pre-shift work it permits, even though it does not require the employees to arrive prior to the start of the shift. *Lindow v. United States*, 738 F.2d 1057, 1060 (9th Cir. 1984).

The FLSA requires employers to pay employees overtime for hours worked in excess of 40 per week. 29 U.S.C.A. § 207(a). "The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Barrantine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (*citing* 29 U.S.C. § 202(a).) Under the FLSA, an employer must compensate employees at one and one-half time their regular rate of pay for all hours worked in excess of 40 in a week. 29 U.S.C. § 207. For employees paid solely by the hour, their regular rate of pay for overtime purposes is the hourly rate. 29 C.F.R. § 778.110.

B. Compensable Time

The donning, doffing, and cleaning of personal protective equipment is work: it is time employees are required to give their employer at IBP's Pasco plant. *See* 29 C.F.R. § 785.7. Protective equipment also is integral and indispensable to the job, as is evidenced by IBP's lists of required protective equipment and eventual payment of 4 minutes time for clothes changing. For employees required to wait to receive or wash this equipment, this time also is compensable. Waiting time is compensable if an employee is "engaged to wait" and cannot otherwise "use the time effectively for his own purposes." 29 C.F.R. § 785.15. *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Pasco plant employees are required to wait to obtain their gloves and to wash their equipment. This time is compensable.

Walking time is compensable if it occurs after the start of the work day. 29 U.S.C. § 254(a). Walking time is excluded under the Portal to Portal Act only if it occurs "either prior to the time on any particular work day at which such employee commences or subsequent to the time on an particular work

day at which he ceases, such principal activity or activities." *Id.* The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time. 29 C.F.R. § 790.6(b). Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy. The Court acknowledges that there are considerable differences in how and where each employee dons and doffs his or her equipment. Given these differences, the compensable time for each activity is on the basis of a reasonable time, rather than the actual time required for each activity. Evidence of reasonable time was supplied by employee and expert testimony supplied by the Plaintiffs, and not rebutted by IBP. Therefore, the reasonable walking time from the locker to workstation and back, as indicated below, is compensable for employees required to don and doff compensable personal protective equipment stored in their lockers, as is the walking time thereafter, as it occurs during the "work day."

Donning and doffing other, non-unique protective equipment, including and limited to hard hats, earplugs, frocks, safety goggles, a hair net, and boots is also work: it is time required by the employer from the employee, but it is not integral and indispensable to the job.[6] Although the Court disagrees with the court's holding in *Reich, supra*, that these activities are not work, the Court does agree with how the court characterized such activities, "[t]he placement of a pair of safety glasses, a pair of earplugs and a hard hat into or onto

[6] Alternatively, the time it takes to complete such work is de minimis as a matter of law

the appropriate location on the head takes all of a few seconds and requires little or no concentration." 38 F.3d 1123, 1126. Therefore, the time required to don, doff, and clean the non-unique protective equipment is not compensable.

Dr. Mericle estimates that employees spend an average of 9.73 minutes in pre-shift activities and a 5.43 minutes in post-shift activities for a total of 15.16 minutes in pre- and post-shift activities. Dr. Mericle did not include times for various activities in his average time calculations. (Ex. 1035.) His average did not include time for donning and doffing yellow plastic sleeves, clear plastic sleeves, clean-cut gloves, clear plastic leggings, sanding steels, cleaning saws, donning and doffing boots and weight belts, and cleaning or washing knifes. The Court will not adopt Dr. Mericle's average time totals, as the FLSA rights are individual rights and compensation should be administered on an individual basis, and the time required for each job varies with the equipment required. For example, the time required to don equipment can range from 2.497 minutes on line 710B as a flanker, to 5.827 minutes on 710B on lips. (See Ex. 1033 and 1024.)

Plaintiffs' expert, Dr. Mericle, has prepared average times for particular pre- and post-shift and meal-time work activities. Dr. Mericle's times as to these activities are accepted by the Court for three reasons: first, Defendant did not offer an alternative time-study; second, the methodology of Dr. Mericle was followed by the DOL in its time studies involving IBP, and seems to be accepted in the meat packing industry (Test. of Dr. Fernandez and Exs. 241, 103); and, finally, the testimony presented convinces the Court that these times are the reasonable times required for performance of each activity. Employee testimony also supported these times.

The Court finds the following activities are work, and that the following times are the reasonable amount of time required to perform each activity:

Equipment	put on:	take off:
mesh apron	.351[7]	.172
mesh legging apron	.897	.233
scabbard	.264	.172
steel	.186	[8]
mesh glove	.372	.113
polar sleeve	.364	.081
plexiglass arm guard	.091	.047
one mesh sleeve	.307	.095
double mesh sleeve	.473	.170
whites[9]	.578	.126
frock*	.474	.162
rubber apron	.492	.157
yellow plastic sleeve	.171	.071
clear plastic sleeve	.382	.109
rubber glove	.196	.077
clean cut glove	.123	.165
cloth glove	.202	.070

[7] All times are indicated in minutes.

[8] Times not indicated were not measured or presented to the Court.

[9] As to all items marked *, while the Court finds the activity compensable, the time is excluded under 3(o), as it applies to pre- and post-shift duties, but not as it applies to meal-time breaks. See VI.A. *infra*.

Equipment:	put on:	take off:
rubber or safety boot*	.382	.177
weight belt	.279	.173
clear plastic legging	.586	.146
safety glasses*	.076	.073
hard hat*	.134	.101
ear plugs*	.135	
hair net*	.290	
Walking	kill:	process:
walking from locker to work station	.962	1.653
walking to cafeteria to get gloves	1.061[10]	
walking from work station to locker	.962	1.653
walking to cafeteria from work station	1.091	1.352
walking from cafeteria to work station	1.091	1.352
wait and dip scabbard and steel	.179	
Other activities	kill:	process:
wait for wash	.036	.571
wash and clean equipment	1.085	.853

[10] Items not separated between the kill floor and slaughter floor were the same for each floor.

Other activities:	kill:	process:
clean and wash knives	.307	
clean saw	.482	
sand steel	1.829	
wait and obtain gloves	.843	
handle equipment: get ready and put away	.562	
knife sharpening[11]		

In determining that work is occurring pre- and post-shift, the court is aware of the need to view the practical effect of the company's work-place policies. This case involves workers who must do a number of little tasks required by company policy that have significant cumulative effects. Some of the tasks may not be compensable when considered in isolation, but become so when combined with others that are performed contemporaneously. The donning, doffing, cleaning, and storage of required equipment, safety and otherwise, are integral and indispensable to the workers' duties as meat processors. This finding is bolstered by the fact that IBP did decide to pay its union members 4 minutes of clothes-changing time.

The inclusion of compensation for yellow gloves justifies further discussion and illustrates the practical effect of the performance of otherwise small tasks. IBP suggests that the yellow gloves are provided only as a convenience to the workers and, therefore, the effort expended in acquiring, putting on, and taking off the gloves is not work. The testimony of the workers, some supervisors, and the actions of IBP show otherwise.

[11] No testimony was presented as to the length of time it takes to complete this work item.

The workers testified that they could not hold the knives safely without the clean gloves because of the blood and fat that made them slip. Many workers changed their gloves multiple times a day in order to keep them clean. Some had as many as six to eight pairs that they changed throughout the day. In addition to safety concerns, the employees testified that the gloves were necessary as insulation from the cold of the refrigerated carcasses and the cold temperature of the processing floor. Cold hands made it more dangerous to use knives, saws, and other types of cutting equipment. Each employee turned in the dirty gloves to the laundry room at the end of the shift and spent considerable time before shift locating their own set after the gloves were returned from the laundry room.

IBP's actions with the gloves supports the workers' testimony. IBP furnishes new gloves to the workers on a weekly basis. IBP provides pins to the workers to collect their dirty gloves at the end of each shift. IBP washes the gloves overnight and provides them for pick-up the next day before the shift begins. If a worker's gloves are missing, a foreman will assist in providing others. It is doubtful that IBP would expend this type of effort on something that was not integral and indispensable to the performance of the work. IBP's superintendent of the "B" shift in processing, Jack Ross, said as much.

IBP chooses to store the safety equipment in each worker's locker and to make the worker responsible for the storage and cleaning of the equipment. IBP chooses to dispense the gloves in various locations in the plant. While an employee is not necessarily working when he or she arrives at his or her locker, the fact that the necessary equipment is stored there and must be put on thereafter makes the work day start at a point in time that a worker must arrive at the locker to complete the donning and obtaining of necessary compensable equipment. The amount of time it takes to obtain

and don the equipment varies in accordance with the equipment used. For instance, it is likely that an employee who is required by the company to wear only a frock, safety glasses, hard hat, ear plugs, and hair net, would not be considered to be working upon arrival at his or her locker. On the other hand, a worker who is required to come to work 15 minutes early to turn on equipment that needed to warm up before work started probably would be engaged in work for the full 15 minutes, even though inactive after the first task. An employee who turned on his or her equipment immediately before starting is probably not engaged in work, even though some time is spent in doing this task before starting.

The Court finds that the representational testimony was adequate in proving what additional equipment was required beyond the Required Equipment Lists and equipment beyond the minimal equipment list and allocation of activities to work codes shall be in accordance with the Court's Order on Objections.

C. Meal Breaks. 29 C.F.R. § 785.19

29 C.F.R. § 785.19 provides, in relevant part, that:

> Bona fide meal periods are not worktime. . . . The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

There are no cases discussing what "special conditions" would permit an unpaid meal break of less than 30 minutes under 29 C.F.R. § 785.19(a). Regardless, 29 C.F.R. § 785.18 provides that no "special conditions" would permit an unpaid meal break of less than 20 minutes. "Rest periods of short

from 4 minutes to about 20 minutes are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked." *Id.*

1. Relieved of Duty Test

The Ninth Circuit has adopted the completely-relieved-of-duty test to determine whether an employee is relieved of his duties during meal breaks. *See Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975) (holding "[a]n employee cannot be docked for lunch breaks during which he is required to continue with any duties relating to his work"); *see also Biggs v. Joshua Hendy Corp.*, 183 F.2d 515 (9th Cir. 1950). The completely-relieved-of-duty test looks to whether the employee is, indeed, completely free of any work-related tasks. *See Wahl v. City of Wichita*, 725 F. Supp. 1133, 1143-44 (D. Kan. 1989); *see also Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 n.1 (4th Cir. 1985) (holding "[t]o qualify as a bona fide non-compensable break, the respite must be uninterrupted and at least thirty minutes in duration, and the employee must be completely relieved from duty.") "The employer bears the burden to show that meal time qualifies for this exception from compensation." *Bernard v. IBP*, 154 F.3d 259, 265 (5th Cir. 1999), *citing Roy v. County of Lexington, South Carolina*, 141 F.3d 533, 544 (4th Cir. 1998).

2. IBP—Failure of Relief of Duties During Meal Break

There is sufficient evidence to find that employees at IBP's Pasco plant are not completely relieved of duty during their meal break. IBP's own management testified that as early as 1988, IBP received complaints of employees receiving only 15-20 minutes at lunch. (See testimony of Ken Kimbro and Ex. 192.) Mr. Kimbro testified that IBP should have investigated these complaints, but decided not to do so. Furthermore, Defendant's own internal documents indicate

that employees were required to remove certain equipment before lunch and, by implication, were required to don equipment after lunch. In an internal IBP memo dated August 6, 1999 from Barb Salter, superintendent of the kill floor, to Lee Baczwaski, plant manager at Pasco, Ms. Salter states that when employees go to lunch and breaks "the employee must remove rubber apron, apron, gloves, sleeves and scabbard with chain. Frocks also for those that wear one. All other equipment is allowed to remain on." (Ex. 82.) The memo goes on to state that, when using the restroom, employees must remove "rubber apron, gloves, sleeves, mesh equipment scabbard with chain, frocks for those that wear one." Ms. Salter notes that "20% of slaughter employees wear no mesh equipment or scabbard and chain." (Ex. 82.) A similar memo was prepared on August 5, 1999 by Gary Johnson, superintendent of A shift, directed to Lee Baczwaski. Mr. Johnson states that when going to lunch or break, "employees must remove their gloves, sleeves, and frock." When going to the bathroom "they must remove their frocks, gloves, sleeves, and mesh equipment."

The IBP employee manual makes it clear that no frocks or knife equipment are allowed in the cafeteria and that "any type of protection worn outside of the frock must be removed." (Ex. 1 page 17.) The same is true of the bathroom. "All equipment must be removed before entering restrooms except hard hat." (Ex. 1 page 19.) The employee manual for IBP also notes that "employees *MUST* be at their work stations at the end of breaks, and rest periods. Failure to do this will be counted as an unexcused tardy." (Ex. 1 page 17; emphasis in original.)

3. Compensable Meal Break Time

Based on the compensable time categories above in section IIIB, if any employee receives 20 minutes or more during his or her lunch break, exclusive of time to don and doff the required equipment, he or she will receive that portion of her

meal break that is spent donning and doffing. If, in the calculation for a particular employee under the times outlined above, an employee falls under the required 20-minute break for her meal period, he or she is to be compensated for the entire 30-minute break. For example, an employee working on the kill floor who is paid at meal time for donning and doffing his or her rubber apron, apron, gloves, sleeves, and scabbard with chain, and mesh equipment[12] and walking times, would be spending 8.251 minutes of the meal time for compensable work activities, and should recover for 8.251 minutes. (See Ex. 1042.)

VI. Defenses

A. 29 U.S.C.A. § 203(o)

Sections 206 and 207 of Title 29 provide for minimum and overtime wages for employees. 29 U.S.C. §§ 206, 207. Section 203(o) creates an exclusion from compensable working time.

> In determining for the purposes of 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each work day which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o).

Courts have found a negotiated and subsequently deleted clothes-changing provision to be sufficient evidence of a custom or practice. *See, e.g., Nardone v. General Motors, Inc.*, 207 F. Supp. 336, 340 (D.N.J. 1962) (holding that policy of non-compensation for changing time existed because the

[12] The Court finds that employees are required to use the restroom during meal-time breaks.

negotiations were on an equal basis and the "collective bargaining agreement negotiations encompassed" the issue); *Hoover v. Wyandotte Chems. Corp.*, 455 F.2d 387, 389 (5th Cir. 1972); *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 675 (2nd Cir. 1994) (holding "[i]f the parties to a collective bargaining agreement negotiate over an issue and have an understanding that resolves it, then a 'practice' exists, even in the absence of express written terms.")

Defendants claim that because the clothes-changing provision was once in the collective bargaining agreement and has since been negotiated out, there is a custom or practice at IBP's Pasco plant. There was a provision for clothes changing time in the CBA's for the year 1976 and for the years 1979-1982, but such a provision was eliminated in 1982 and renegotiated and left out in 1992. The negotiated provision read "[c]lothes changing time for one-half hour per week shall be granted to all employees required to change their clothing before performing their work assignments." (Ex. 217 page 37.) John Carter testified that in 1999, the Union negotiated for 10 minutes a day of "clean-up time." (Ex. 249, page 1.) Mr. Carter testified that this was to include pre- and post-shift time, including washing mesh, putting on and taking off clothes and safety equipment. Mr. Carter did not know if this time included sanding steel. He also testified that the company would figure out if this time was overtime, or if they would start the chain later or end it earlier.

Even if the union did bargain away rights under 3(o), they are unable to negotiate and bargain beyond clothes changing and washing time. Union representatives may not bargain away employee rights under the FLSA. *See Featsent v. City of Youngstown,* 70 F.3d 900, 905 (6th Cir. 1995), *citing Walling v. Harnischfeger Corp.*, 325 U.S. 427, 431-32 (1945). The Ninth Circuit has held "that the FLSA's minimum wage and overtime provisions . . . are guarantees to individual workers that may not be waived through collective bargaining." *Albertson's, Inc., v. United Food & Commercial*

Workers Union, AFL-CIO & CLC, 157 F.3d 758, 761 (9th Cir. 1998) (*internal quotations omitted*) *citing Local 246 Utility Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292 (9th Cir 1996) (holding that where employees' claim is based on substantive rights under the FLSA no resort to arbitration under the CBA is required). *See also Collins v. Lobdell*, 188 F.3d 1124, 1127-28 (9th Cir. 1999) (holding that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement). The Supreme Court also has held that FLSA rights "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrantine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (*citations omitted.*) Conflicting provisions between FLSA and collective bargaining agreements are resolved in favor of the FLSA. *See id.*

Clothes changing and washing of the person will be excluded from compensability, as will donning and doffing of hard hat, ear plugs, safety glasses, boots, and hairnet. Clothes changing is limited to changing into and out of the frock, and washing time is limited to washing of the person. The union is not capable of bargaining away the union members' rights to overtime pay for putting on and taking off safety equipment but, rather, only has authority to negotiate clothes changing and washing under 3 (o).

Section 3(o) does not apply to meal-time claims by its express language and, therefore, frock time is excluded from pre- and post-shift activities, but not from meal-break compensability measures.

B. Good Faith Reliance—29 U.S.C. § 259(a)

Section 259(a) of the FLSA provides the following affirmative defense:

> In action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended . . . , if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified to subsection (b) of this section [the Department of Labor], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

The test under section 259 is an objective one. *See Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990) (holding no good faith reliance where employer's policy was not in conformity with the opinion letters upon which it alleged reliance).

IBP contends that it relied upon the issuance of several DOL letters and the DOL's practice of excluding IBP's union plants from litigation in making its decision not to compensate union employees for activities such as clothes changing, washing, sanding steel, and donning and doffing personal protective equipment. IBP's claim seems to be that because the non-union plant litigation covered both clothes changing and washing, which would be excluded from compensable time at the union plants by 3(o), and other activities, such as sanding steel and donning protective equipment, that DOL's policy position was that 3(o) covered all activities at the union plants, not just those specifically excluded by 3(o).

The evidence suggests, however, that the DOL never took a position beyond stating that 3(o) excludes union plants for

clothes changing and washing time. Kenneth Kimbro, Sr., Vice President for Human Resources at IBP, testified that he relied on materials he reviewed from the DOL. Mr. Kimbro testified that he relied on DOL's Response to IBP's objections to the injunction in the Kansas litigation. (Ex. 230.) In that response, DOL says that the decree does not apply to union plants and, in doing so, quotes the language of 3(o). This does not suggest that the DOL is altering or expanding the scope of 3(o) to include activities other than clothes changing and washing. Mr. Kimbro also testified that he had reviewed the DOL's pre-trial brief in the Kansas litigation and knew that the DOL was making a distinction between work clothing and personal protective equipment. (Ex. 1056.) The other documents upon which Mr. Kimbro testified that he relied are of similar substance. In a letter from Solicitor of Labor, Marshall Breger, to IBP attorney Eizenstat, Breger paraphrases section 3(o) and does not define clothes changing or washing. (Ex. 224.) In letters from Eizenstat to Breger, Eizenstat says what Eizenstat thinks 3(o) means. (Ex. 225.) Mr. Kimbro also testified that he knew the language of 3(o) does not apply to lunch breaks.

Mr. Kimbro testified that in December 1997, the DOL changed its previous position on clothes changing at union plants. (Ex. 64). But the letter, in fact, states that putting on, taking off, and washing of protective safety equipment are compensable activities under the FLSA if they are integral to an employee's principal activities. The DOL had never taken a position about the compensability of these activities. IBP, therefore, had nothing upon which to rely, other than its assumptions about what clothes changing and washing were included under 3(o).

C. Portal to Portal - 29 U.S.C. § 254(a) and "integral and indispensable"

The Portal to Portal Act limits compensable activities under the FLSA.

> [N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . .
>
> > (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time of any particular work day at which such employee commences, or subsequent to the time on any particular work day at which time he ceases, such principal activity or activities.

29 U.S.C. § 254(a).

The Supreme Court has created a narrow exception to the rule of noncompensability under the Portal to Portal Act when the activities "are an integral and indispensable part of the principal activities for which the [employees] are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). In *Steiner*, the Court held that post-shift washing by employees exposed to highly toxic lead compounds and fumes during the work day were compensable. *Id.* The test the Court created for finding which activities were integral and indispensable is whether (1) it was made necessary by the nature of the work, and (2) it fulfilled the mutual obligations between employer and employee. *Id.* at 256. *See also Mitchell v. King Packing*

Co., 350 U.S. 260, 263 (1956) (holding that knife sharpening is "principal" activity of butchers in meat-packing plant).

IBP claims that the activities claimed to be compensable by Plaintiffs fall under the Portal to Portal Act exception and were found not to be integral and indispensable by the Tenth Circuit in *Reich v. IBP*, 820 F. Supp. 1315, 1319 (D. Kan. 1993), *aff'd*, 38 F.3d 1123, 1125 (10th Cir. 1994) (holding only knife carrying employees performed any compensable activities and that standard protective items "were not so uniquely and closely related to the dangers inherent in meat production to make the wearing them an integral and indispensable part of the meat production workers' jobs.")

The evidence suggests, however, that at Pasco, donning and doffing personal protective equipment and sanding steel are made necessary by the nature of the work and fulfill mutual obligations between IBP and its employees. In an internal IBP memo dated August 6, 1999 from Barb Salter, superintendent of the kill floor, to Lee Baczwaski, plant manager at Pasco, Ms. Salter states that when employees go to lunch and breaks, "the employee must remove rubber apron, apron, gloves, sleeves and scabbard with chain. Frocks also for those that wear one. All other equipment is allowed to remain on." (Ex. 82.) The memo goes on to state that when using the restroom, employees must remove "rubber apron, gloves, sleeves, mesh equipment scabbard with chain, frocks for those that wear one." Ms. Salter notes that "20% of slaughter employees wear no mesh equipment or scabbard and chain." (Ex. 82.). A similar memo was prepared on August 5, 1999 by Gary Johnson, superintendent of A shift, directed to Lee Baczwaski. Mr. Johnson states that when going to lunch or break "employees must remove their gloves, sleeves, and frock." When going to the bathroom "they must remove their frocks, gloves, sleeves, and mesh equipment."

In addition, there was presented a "Required Personal Protective Equipment List, Pasco Complex, Minimum Safety Equipment Requirements, Slaughter Kill Floor." (Ex. 90.) The first line of text indicates that the list below is the minimum requirements "to be worn by ALL IBP Personnel while performing the following jobs." (Emphasis in original.) Similar documents were admitted for processing employees. (Ex. 91, 92, and 93.) This evidence suggests that the wearing of protective equipment is made necessary by the nature of the work.

While cloth gloves are not on these lists, testimony from employees suggested that these, too, were made necessary by the nature of the work. (Testimony of Ranoulfo Gutierez.)

Frocks also are not on this list. Testimony from James Lochner, CEO of fresh meat division at IBP, indicated that frocks were necessary to detect possible contamination. In any case, frock-changing time is found to be not compensable under 3(o), as it qualifies as changing clothes.

Hard hats, safety goggles, earplugs, a hairnet, and boots are not made necessary by the nature of the work.

Finally, there is some dispute about whether sanding steel is necessary by the nature of the work. The testimony presented indicates that for knife users, sanding steel is required to keep the edge of the knife straight. The evidence is that a straight-edged knife reduces danger to the employee and improves the employee's ability to perform his or her job. IBP's employee manual directs employees to sand their steel. (Ex. 1.)

The representative evidence establishes that class members engaged in both a pattern and a practice of pre-shift and post-shift FLSA work not subject to § 4(a) Portal to Portal Act, 29 U.S.C. § 254(a) restrictions.

VII. State wage and hours claim. RCW §§ 49.46.020, .130; 49.12.005; 49.52.050-.070

A. Overtime Claims—RCW §§ 49.46.020, .130

RCW § 49.46.130 provides that "every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [the minimum wage] except as may be otherwise provided under this section."

RCW § 49.46.130 provides that "[e]xcept as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

WAC 296-126-002(8) defines hours worked as including "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place." The Washington Supreme Court has looked to the FLSA for guidance in interpreting "hours worked." However, there is no 3(o) or Portal to Portal equivalent under state law. Interpretive Guideline No. ES-016 does state that "preparatory and concluding activities" are generally included in the definition of "hours worked," and RCW 49.12.187 states that "[t]his chapter shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representative of their own choosing concerning wages or standards or conditions of employment."

B. The MWA Provides A Minimum

The class members were employed by IBP on an hourly basis and, therefore, the MWA requires IBP to pay the class members at least the state minimum wage for all hours

worked. *See SPEEA v. Boeing*, 139 Wash. 2d 824 (2000). The state minimum wage was $4.90 per hour at the start of the MWA damages period herein on June 30, 1995; it increased to $5.70 per hour on January 1, 1999, and to $6.50 per hour on January 1, 2000. *See* RCW 49.46.020.

Other provisions permit collective bargaining to establish wages or other conditions of work only "in excess of the applicable minimum under the provisions of this chapter." RCW 49.46.110. *See also Lundborg v. Keystone Shipping Co.*, 138 Wash. 2d 658, 669-70 (1999). Washington and Ninth Circuit courts have held that rights provided by the Minimum Wage Act may not be waived or altered by a collective bargaining agreement *See Ervin v. Columbia Distrib., Inc.*, 84 Wash. App. 882, 891 (1997), *citing Local 246 Utility Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292 (9th Cir. 1996). *See also Schneider v. Snyder's Foods, Inc.*, 95 Wash. App. 399, 402 (1999) (holding that in enacting the protections under the Minimum Wage Act, "the Legislature has stated that collective bargaining agreements may establish wages or other work conditions only in excess of the statutory minimums").

C. IBP and State Law Claims—Overtime

The same analysis applies here to overtime claims as under the FLSA. The Washington standard may be more liberal but, in either case, the activities of donning and doffing safety equipment, getting cloth gloves, sanding steel, and frocks are compensable. WAC 296-126-002(8) defines hours worked as including "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place."

D. *Inniss*

Inniss was decided after the court denied IBP's motion for summary judgment on Plaintiffs' claims for minimum wage under the Washington Minimum Wage Act, and denied IBP's

motion for reconsideration of the May 24 order. Defendant contends that the Supreme Court expressly adopted a "weekly" standard for minimum wage compliance in *Inniss*, and again requests reconsideration of their motion or, in the alternative, certification of the issue to the Washington Supreme Court.

In *Inniss*, the Washington Supreme Court held that the employment practice of a "fluctuating workweek" did not violate the Washington Minimum Wage Act, chapter 49.46, when calculating overtime compensation at "one and one half times the regular rate" under RCW 49.46.130(1). *Inniss v. Tandy Corp.*, 141 Wash. 2d. 517 (2000). The relevance of this decision to the regular rate determination for hourly employees is unclear. The court specifically refers to 29 C.F.R. § 778.114, which relates to the regular rate in the context of a fluctuating workweek and provides that "[t]he 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act . . ." The regulation also provides, "such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight time compensation for long workweeks as well as short ones . . .". *See* 29 C.F.R. § 778.14(c). The *Inniss* decision is particular to determining the regular rate for employees under a fixed salary with fluctuating hours. However, the court declared that the WMWA was not violated "because the actual weekly compensation for each Petitioner was never less than the total weekly compensation based upon the minimum hourly wage under RCW 49.46.020." 141 Wash. 2d at 533-34. This Court can only apply, not expand, state law and, therefore, absent a clear indication from the Supreme Court, it will use an hourly standard.

E. State Meal Break Claims

In the Order on Objections the Court clarified its conclusion relating to state law meal break claims under WAC 296-126-092(1) to only allow recovery for the time spent working during the meal break up to 10 minutes under the state law claim, holding "[i]f the time spent working during the meal break exceeds 10 minutes, so that the total uninterrupted meal break is less than 20 minutes, the entire 30 minute period shall be recoverable." This conclusion was based on the fact that the Plaintiffs' claim under the MWA is brought to compensate employees for time worked for which they were not compensated. The interpretive guideline under the WAC 296-126-092 indicates that if an employee works during the meal period, the period is to be extended to give the employee a 30-minute meal break. This indicates to the Court that the purpose of both the MWA and the regulation are to allow for time as a remedy for a violation, not necessarily monetary compensation for the entire meal break, when only a portion of the meal break is spent working. This finding also is consistent with the FLSA provision for meal-break violations.

If the Court is reversed on appeal on its meal break ruling and Plaintiffs are held entitled to 30 minutes compensation for each meal break during which work was performed, then Plaintiffs would be able to recover $7,297,517, with interest thereon at the rate set by 28 U.S.C. § 1961, for damages calculated through May 14, 2000 and comprised of $5,487,561 in MWA overtime damages, $905,028 minimum wage damages, and $904,928 in rest break damages under Washington law (which includes (1) rest break prejudgment interest, and (2) meal break prejudgment interest for individuals who are not eligible for meal break double damages.)

F. Rest Break

On May 18, 2001, the Court granted Plaintiff's Motion for reconsideration of rest break claims. (Ct. Rec. 669.) The Court held that in *Wingert v. Yellow Freight Sys., Inc.*, 104 Wash. App. 583 (2001), the Washington Court of Appeals held that an implied cause of action exists under the Industrial Welfare Act for damages for lost wages relating to violations of Wash. Admin. Code § 296-126-092. The Court recognized that this decision was contrary to the Court's April 1999 order (Ct. Rec. 69) wherein the Court granted Defendant's Motion for Summary Judgment on Plaintiffs' separate claims for meal and break period violations, holding that Plaintiffs did not have a private right of action under Washington's Industrial Welfare Act.

The Court has denied Defendant's Motions to certify the question of the implied right of action to the Washington Supreme Court and also has denied Defendant's Motions to stay the rest break hearing until after the Washington Supreme Court determines whether it will review *Wingert*.

WAC 296-126-092 provides the following: "[e]mployees shall be allowed a rest period of not less than 10 minutes, on the employer's time, for each 4 hours of working time. . . . No employee shall be required to work more than three hours without a rest period." The court in *Wingert* held that this regulation does give rise to a private right of action and that this right cannot be negotiated away through union bargaining. *Wingert* at 595. Defendant points the Court to a DLI Interpretive Guideline ES0026 (1992) that stated that collective bargaining agreements supersede WAC 296-126-092. The Court finds this argument unpersuasive. IBP's own personnel manager testified that he was unaware of this guideline, so IBP could not have relied on it. Greg Mowat testified at trial that the DLI intended to remove that sentence, and the Supreme Court has held that state minimum substantive labor guarantees do not interfere with collective

bargaining rights. *See, e.g., Bradshaw v. Livadas*, 512 U.S. 107, 128-130 (1994); *Metropolitan Life Ins. Co. v. Davis*, 471 U.S. 724, 748-49 & n.27 (1985). The Court also rejects Defendant's argument that the difference in language between RCW 49.46.110, which provides that collective bargaining agreements can negotiate conditions above the minimum, and RCW 49.12.187, which contains no such limitation, suggests that unions can bargain away employees' rights to a second 10-minute rest break under the regulation.

The parties have stipulated that after the meal break, employees typically completed their shifts without a paid break. The Court finds that IBP is liable for a second 10-minute rest break, where employees worked 8 hours or more and no second rest break was provided. The Court will not offset the second 10-minute rest break by 5 minutes as a result of the first 15 minute break, as requested by IBP. The regulations requires a break every 4 hours, and providing one longer break period does not avoid the obligation for a second break, as required by the regulation.

G. Preemption

Finally, the Court rejects Defendant's preemption arguments. Under the preemption doctrine expressed in *Machinists*, the NLRA preempts state laws and state causes of action that regulate activity Congress intended to leave unregulated. *Lodge 76, Int'l Ass'n. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976); *Metropolitan Life Ins.*, 471 U.S. at 749. However, the *Machinists* preemption doctrine does not preempt a state law which "establishes a minimal employment standard not inconsistent with general legislative goals of the NLRA." *Metropolitan Life Ins.*, 471 U.S. at 757; *see also Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). "Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act."

Metropolitan Life Ins., 471 U.S. at 756 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, n.20 (1941)); *see also Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1038 (9th Cir. 1999). The regulations at issue here establish minimal employment standards and Defendant has not pointed to, nor has the Court found, any legislative goals of the NLRA inconsistent with the regulations at issue providing for meal and rest breaks.

VIII. Damages

The representative evidence establishes that class members performed off-the-clock work, *i.e.*, unrecorded and uncompensated work, pre-shift, post-shift, and during uncompensated meal breaks. Moreover, IBP failed to keep and maintain records of this off-the-clock work. As the FLSA and MWA protect individual rights, the Court holds that the recovery should also be based on an individualized basis as much as possible.

The Court holds that the Plaintiffs shall submit each employee's damage calculation. The Plaintiffs shall add the times required for each item of equipment, taking into account, if multiple items are used (*i.e.* four pair of cotton gloves), and the number of times the items are donned and doffed (*i.e.* may be donned and doffed twice, once at the beginning and end of work day and once at beginning and end of lunch). This calculation is to include equipment, not just from the employee's required equipment list, but also from the exhibits, testimony, and representative evidence indicating the equipment actually worn. Plaintiffs shall then add the time allotted for these activities with the time for walking and waiting calculated by Dr. Mericle. This information will then be aggregated to calculate the total amount of time worked by each employee. The Court believes that the evidence presented at trial allows for more narrow definitions of job categories, and that calculating damages on the more narrow categories is the most accurate method of determining

damages. Exhibits 178a, 178b, and 178c summarize class member damages based on the individual class member's work histories, individual statute of limitation dates, weekly on-the-clock work paid at regular hourly rates, and the payroll data CD-ROM produced by IBP. Plaintiffs shall substitute the above-described calculations for their current class member work performed for work codes set forth in Exhibits 74, 75, 1048 and the record herein. Plaintiffs are permitted to rely upon representative testimony to establish the equipment used and work performed by class members in job codes, as long as the evidence was introduced at trial. Work codes will be included if admissible evidence was introduced at trial about the job so that the appropriate equipment can be determined from the admitted evidence. The foundation for determining what job categories were entitled to damages and in what amount, are to be determined by reference to the representational evidence. The Court holds that the representational evidence was adequate to determine what work was done and in what amounts.

Plaintiffs are to give 4 minutes credit in their damages calculations of clothes changing time credit since July 1998, as Defendant has provided 4 minutes of paid clothing time since that date.

A. Liquidated Damages Under the FLSA

The FLSA provides for liquidated damages awards equal to back pay. 29 U.S.C. § 216(b). This is considered "'compensation for the retention of a workman pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *Reich v. Southern New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d. Cir. 1997). Section 11 of the Portal to Portal Act allows for a discretion-ary reduction of liquidated damages if the employer proves it acted in "good faith" with reasonable grounds for believing it was not violating the FLSA. 29 U.S.C. § 260. The employer "bears the burden of estab-

lishing, by 'plain and substantial' evidence subjective good faith and objective reasonableness." *Id.* "It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them." *Id.*

The Court holds FLSA liquidated damages are appropriate in this case. IBP has failed to prove § 11 Portal to Portal Act good faith. IBP has never attempted to measure, record, or compensate for substantial amounts of pre-shift, meal-break and post-shift work. When sued herein, IBP reacted by instructing employees to alter clock-in and clock-out closer to their production work times. (Ex. 16; Hester.) IBP was informed of employee complaints regarding meal time work in 1988, and failed to investigate. (Ex. 192; Kimbro.) IBP has failed to present any equitable considerations that would warrant denial of liquidated damages.

B. Double Damages Under State Law

Under RCW 49.52.050 & .070, an employer is liable for double damages if it "[w]ilfully and with intent to deprive the employee of an part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute . . . ." "Wilful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 159-160 (1998) (internal quotations omitted.) "Under a narrow exception to these statutes, double damages are not available if a 'bona fide dispute exists as to obligation of payment.'" *DLI v. Overnite Transp. Co.*, 67 Wash. App. 24, 34 (1992). "The dispute must be 'bona fide,' *i.e.*, a 'fairly debatable' dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid." *Schelling*, at 162; *DLI* at 35-36. Exemplary damages may be ordered on part of the wages owed where the amount of those wages is not subject to dispute. *See Schilling*, at 161 (citing *Brandt v. Impero*, 1 Wash. App. 678, 682 (1969)).

The Court holds IBP liable for exemplary damages for the meal-break violations, but not the rest break violations. IBP knew that meal breaks in Washington had to be "at least 30 minutes" and paid if work was performed. IBP never attempted to provide the employees with a 30-minute meal break. IBP knew employees had to doff and don equipment and that this took some amount of time. The Court finds that the record does not support a finding that class members knowingly submitted to these MWA damages. The Court finds that the FLSA and MWA recoveries are duplicative and, therefore, plaintiffs will only be able to collect judgment on one of the two claims.

The Court will not hold IBP liable for exemplary damages on the second rest break. The Court finds that while IBP willfully deprived employees of this second rest break, it reasonably believed that this rest period was negotiable. This is evidenced by the regulation that suggests cooperative bargaining is appropriate under this regulation, and the extensive negotiation history with the Teamsters regarding rest breaks. Therefore, the Court holds that as to the second rest break, a bona fide dispute existed regarding whether all or a portion of the wages must be paid." *Schelling*, at 162; *DLI*, at 35-36.

C. Attorney Fee

Plaintiffs are entitled to an attorney fee award pursuant to 29 U.S.C. § 216(b), RCW 49.46.090(1), RCW 49.48.030, and RCW 49.52.070, and are directed to file an attorney fee petition. Plaintiffs also are entitled to recover costs under 28 U.S.C. § 1920.

D. Sunshine Payments

IBP has sought to treat Sunshine payments as an offset. The Court finds that these Sunshine payments are in the nature of incentive pay, *i.e.*, a reward for working more efficiently and at greater speeds. In effect, IBP has been

making these payments to slaughter division employees for their production floor performance during their work shift. Sunshine pay is not payment for off-the-clock work, nor is it the type of premium pay that could offset overtime pay obligations under U.S.C. § 207(h). Similarly, Sunshine pay is not compensation for MWA off-the-clock work and does not offset MWA damages.

E. Prejudgment Interest

Prejudgment interest also is awarded on Plaintiffs' state law meal and rest break claims. Prejudgment interest is allowable only when (1) an amount claimed is "liquidated;" or (2) the amount of an "unliquidated" claim is for an amount of money that is "determinable by computation with reference to a fixed standard contained in [a] contract, without reliance on opinion or discretion." *Prier v. Refrigeration Eng'g Co.*, 74 Wash. 2d 25, 32 (1968). A "liquidated" claim is defined as one whose "exact amount is fixed and known." *Prier*, 74 Wash. 2d at 32, citing Charles T. McCormick, Damages (Hornbook Series), §54 (1935); *See also Taylor v. Shigaki*, 84 Wash. App. 723, 732 (1997). Defendant argues that the meal-break claims are not for a sum determinable without reliance on opinion or discretion, as there is no precedent in this area. This argument rests on a misperception of the requirement of a fixed standard and of what prejudgment interest is designed to accomplish.

Prejudgment interest is not awarded only in those cases where the law is clear on whether the amount claimed is owed but, rather, once it is determined that the amount is owed, whether the amount can be determined with exactness. "The fact that a dispute exists over all or part of a claim does not make the claim unliquidated. This is true 'even thought the adversary successfully challenges the amount and succeeds in reducing it.'" *Aker Verdal v. Neil F. Lampson, Inc.*, 65 Wash. App. 177, 190 (1992), quoting *Pier* at 33. "It follows from the foregoing that, where the amount sued for may

be arrived at by a process of measurement or computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest." *Prier* at 33-34. Here, the amount of recovery for the time spent working during the meal period is the time spent working, and if that time extends beyond 10 minutes, the entire 30-minute period is recoverable. The compensable time is easily determined by looking to the pay rates for employees and calculating the time spent working during the meal break on days where a meal break was required. Finally, pre-judgment interest is not to punish Defendant but, rather, to compensate the Plaintiffs for money wrongfully withheld. "Prejudgment interest is not a penalty imposed on a defendant for wrongdoing nor is its purpose to deter wrongdoing." *Hansen v. Rothaus,* 107 Wash. 2d 468, 475 (1987).

IT IS HEREBY ORDERED:

1. Plaintiffs are to present a proposed judgment consistent with this Order and with the Court's Order on Objections.

2. The Court will hear telephonic oral argument on the issue of injunctive relief on October 4, 2001 at 1:30 p.m. If the parties request oral argument in person they shall notify the Courtroom Deputy, Michelle Fox, by October 1, 2001.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 14 day of September 2001.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Nov. 28, 2003]

No.02-35042
D.C. No. CV-98-05005-RHW

GABRIEL ALVAREZ, individually and as class representatives; RANULFO GUTIERREZ, individually and as class representatives; PEDRO HERNANDEZ, individually and as class representatives; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellees,

v.

IBP, INC., a Delaware corporation,
Defendant-Appellant.

No. 02-35110
D.C. No. CV-98-05005-RHW

GABRIEL ALVAREZ, individually and as class representatives; RANULFO GUTIERREZ, individually and as class representatives; PEDRO HERNANDEZ, individually and as class representatives; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ

Plaintiffs-Appellants,

v.

IBP, INC., a Delaware corporation,
Defendant-Appellee

ORDER

Before: D.W. NELSON, THOMAS, Circuit Judges, and ILLSTON, District Judge*.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* The Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX D

29 U.S.C. § 203. Definitions

As used in this chapter—

* * * *

(*o*) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * *

29 U.S.C. § 204. Administration

(a) Creation of Wage and Hour Division in Department of Labor; Administrator

There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

* * * *

29 U.S.C. § 251. Congressional findings and declaration of policy

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the

results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey [41 U.S.C. § 35 et seq.] and Bacon-Davis [40 U.S.C. § 276a et seq.] Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

29 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act [41 U.S.C. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

* * * *

29 U.S.C. § 259. Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation

under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act [41 U.S.C. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C. § 276a et seq.], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.]—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act [41 U.S.C. § 35 et seq.]—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act [40 U.S.C. § 276a et seq.]—the Secretary of Labor.

APPENDIX E

29 C.F.R. § 790.1. Introductory statement.

* * * *

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

* * * *

29 C.F.R. § 790.6. Periods within the "workday" unaffected.

* * * *

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that

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[3] Sections 790.23 through 790.29 in the prior edition of this Part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

29 C.F.R. § 790.7. "Preliminary" and "postliminary" activities.

* * * *

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, "actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and

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[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

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[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

* * * *

29 C.F.R. § 790.17. "Administrative regulation, order, ruling, approval, or interpretation."

* * * *

(d) The term "ruling" commonly refers to an interpretation made by an agency "as a consequence of individual requests for rulings upon particular questions."[104] Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

* * * *

29 C.F.R. § 1910.1030. Bloodborne pathogens.

* * * *

(b) Definitions. For purposes of this section, the following shall apply:

* * * *

"Personal Protective Equipment" is specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (e.g., uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment.

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[104] Final Report of the Attorney General's Committee, page 27. To the same effect in 1 Vom Baur, Federal Administrative Law (1942), p. 492.

APPENDIX F

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 6, 2002 [SEAL]

Samuel D. Walker
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Walker:

This responds to your letter of December 12, 2001, on behalf of the American Meat Institute, requesting reconsideration of two opinion letters issued by the Acting Administrator of the Wage and Hour Division and the Administrator of the Wage and Hour Division, respectively, on December 3, 1997, and January 15, 2001. The opinion letters concern application of section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o), to employees in the meat packing industry. Specifically, the letters set forth the position that section 3(o) does not apply to the putting on, taking off, or washing of the protective safety equipment typically worn in the meat packing industry, such as mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts.

As noted in the January 15, 2001 opinion letter, the construction of section 3(o) enunciated in the December 3, 1997 Opinion Letter had never previously been put forward by the Administrator. Further, a number of regional and district officials of the Wage and Hour Division and the Office of the Solicitor had, in their enforcement of some cases, historically applied section 3(o) if a bona fide collective bargaining

agreement excluded from hours worked the time spent by employees putting on, taking off and cleaning protective equipment.

We have completed a careful review of the interpretation of section 3(o) set forth in these opinion letters, as well as in the opinion letter issued by the Acting Administrator on February 18, 1998. It is our view, based upon a reexamination of the statute and legislative history, that the "changing clothes" referred to in section 3(o) applies to the putting on and taking off of the protective safety equipment typically worn in the meat packing industry, as described in your letter. It remains our view, however, that the term "washing" in section 3(o) applies only to washing of the person and does not apply to the cleaning or sanitizing of protective equipment. Accordingly, for the reasons set forth below, we are withdrawing as of this date the opinion letters dated December 3, 1997, February 18, 1998, and January 15, 2001 (as it relates to section 3(o)).

Section 3(o) of the FLSA, enacted in 1949, provides that an employer does not have to pay for time spent "changing clothes or washing at the beginning or end of each workday" if such time is excluded from working time "by the express terms or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o). (We take no position in this letter on what constitutes a custom or practice for purposes of excluding time under section 3(o), or on whether there is such a custom or practice by any employers in your industry.) The FLSA does not define the term "changing clothes or washing" for purposes of section 3(o), and we do not believe that a plain meaning of the term is evident from the statute. One dictionary defines "clothes" as "garments for the body; articles of dress; wearing apparel" (The Random House College Dictionary (revised ed. 1982)), and another defines "clothes" as *"articles*, usually of cloth, designed to cover, *protect* or adorn the body . . . ." (Webster's

New World Dictionary (2d college ed. 1982)) (emphases added). *See also* 29 C.F.R. § 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective *clothing*") (emphasis added). The Department's interpretative regulations on "hours worked," published in 1965, merely repeat the terms "changing clothes" and "washing." *See* 29 C.F.R. § 785.26.

The legislative history is specific only with respect to the interpretation of "washing." The House version of section 3(o) would have allowed the elimination from hours worked of any activity of an employee as provided by the express terms of, or custom or practice under, a collective bargaining agreement. *See* S. Rep. No. 640 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2241, 2255. The conference committee explained that it narrowed the scope of the provision by "limit[ing] this exclusion to time spent by the employee in changing clothes and *cleaning his person* at the beginning or at the end of the workday." *Id.* (emphasis added). This explicitly narrow reading of "washing" is supported by a statement in the debates that describes the conference agreement as "limit[ing]" the provision's application "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday." 95 Cong. Rec. 14875 (1949). *See also* 29 C.F.R. § 790.7(g) & n. 49 (interpretative rule addressing the Portal-to-Portal Act's test for preliminary or postliminary activities using the phrases "changing clothes" and "washing up or showering"); Wage and Hour Division's Field Operations Handbook 31b0l (using the phrase "wash up time" in discussing section 3(o) and "hours worked").

The legislative history does not specifically address the scope of "changing clothes" under section 3(o). The provision was enacted subsequent to the Portal-to-Portal Act of 1947, which in turn was enacted in response to the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.

680 (1946). In *Mt. Clemens*, the Supreme Court held that the time that employees spent walking to and from their work stations on the employer's premises was "hours worked." 328 U.S. at 691-92. The Court also found compensable, as a necessary prerequisite to the employees' production work, such preliminary activities as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger sheaths, preparing equipment, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools. *Id.* at 692-93.

The legislative history indicates that some clothes changing was expected to remain compensable after enactment of the Portal Act, and the Supreme Court has so held. *See Steiner v. Mitchell*, 350 U.S. 247 (1956). During debate on the Act, one of the bill's sponsors stated that the clothes changing and showering that might be required of "chemical plant workers" would remain a compensable principal activity. 93 Cong. Rec. 2297-98 (1947). The Supreme Court appended this legislative history to its decision in *Steiner*, where it held that the time spent by workers in a battery plant changing into and out of old work clothes and showering was compensable. Although "changing clothes and showering under normal conditions . . . ordinarily constitute 'preliminary' or 'post-liminary' activities excluded from compensable work time" under the Portal Act, the Court ruled, clothes changing and showering under the circumstances of this case are "an integral and indispensable part of the production of batteries." 350 U.S. at 249, 255-56. Thus, while the Portal Act excluded "ordinary" clothes changing from compensable time, other clothes changing that was not "merely a convenience to the employee" and that was "directly related to the specific work" remained compensable (93 Cong. Rec. 2297-98 (1947)).

The function of section 3(o) is to allow companies and unions to agree to treat as non-compensable clothes-changing

activities that otherwise would be compensable under the Portal Act. In stating that the Act invalidates such agreements in the case of protective gear in the meat packing industry, the 1997 opinion letter confined its reasoning to a single sentence where it explained that "clothes" has a "plain meaning" which excludes: (i) "protective" articles that (ii) may be "cumbersome in nature" and (iii) are "worn over . . . apparel." Upon review, we have concluded that none of these qualities should prohibit a company and union from regarding the gear worn in the meat packing industry as clothes for purposes of section 3(o).

The Department of Labor has described articles worn for protective purposes as clothing, and so has a leading dictionary. *See* 29 C.F.R. § 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective clothing"); Webster's New World Dictionary (2d college ed. 1982) ("clothes" are "articles, usually of cloth, designed to cover, protect or adorn the body . . ."). The Supreme Court has used the phrase "protective clothing" on more than one occasion. *See, e.g., Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 660-61 (1980) (the "Benzene" case) (plurality) (stating that compliance with an OSHA requirement "could be achieved simply by the use of protective clothing, such as impermeable gloves"); *United States v. Stanley*, 483 U.S. 669, 671, 690 (1987) (referring to clothing to protect from chemical exposure and radiation). Congress, in enacting the Portal Act, and the Supreme Court, in interpreting it in *Steiner*, recognized that the purpose of clothing specially worn for the workplace might well be protection. Indeed, it was in part precisely because the clothing at issue served protective purposes that, in the legislative debates and *Steiner*, Congress and the Court indicated that donning and doffing the clothing at issue was "integral" to the job and, accordingly, compensable.

That an article may he "cumbersome" also is no indication that it is not clothing. Many items of clothing are cumbersome. In the case of clothing worn for protective purposes in particular, it often will be more protective if it is larger, heavier, and therefore more cumbersome than street clothes. It would disserve the workers the Fair Labor Standards Act is meant to protect if employers who wished to introduce bulkier and more protective gear in the workplace knew that in doing so they would lose their ability to bargain with their union over the compensability of donning and doffing protective gear. Such an intent should not be attributed to Congress in interpreting 3(o). In addition to lacking basis in the statutory text and legislative intent, a distinction between apparel that is "cumbersome" and that which is not is vague, difficult to administer, and fails to provide useful guidance to employers and unions regarding the legitimate parameters of their agreements and practices.

Finally, that an item is worn on top of another item plainly is no reason to believe they are not both items of clothing.

There are other bases in the history and purpose of section 3(o) for concluding that a broader interpretation of the provision is appropriate. It is reasonable to assume that when Congress enacted section 3(o), it had in mind the kind of "clothing" at issue in the *Mt. Clemens* case just three years earlier; that case involved aprons and overalls, shirts, and finger sheaths. Finally, a less rigid definition of "clothes" comports with Congress's intent in enacting section 3(o), which was to give a measure of deference on this aspect of wage-hour practice to the agreements and judgments shared by companies and their employees' duly-designated representatives for purposes of negotiating the terms and conditions of employment. *See* 95 Cong. Rec. 11210 (1949).

In sum, for the foregoing reasons we believe that the term "clothes" in section 3(o) includes the protective safety equipment typically worn by meat packing employees.

Accordingly, we interpret "clothes" under section 3(o) to include items worn on the body for covering, protection, or sanitation, but not to include tools or other implements such as knives, scabbards, or meat hooks. Furthermore, the term "washing" refers only to washing of the person, and not to the washing, cleaning, or sanitizing of protective or safety equipment. *See Saunders v. John Morrell & Co.,* 1 WH Cases 2d 879 (N.D. Iowa 1991).

Sincerely,

/s/ Tammy D. McCutchen
TAMMY D. MCCUTCHEN
Administrator

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(2)

No. 03-1238

IN THE

SUPREME COURT OF THE UNITED STATES

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF NATIONAL CHICKEN COUNCIL, AMERICAN MEAT INSTITUTE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

DAVID R. WYLIE
(Counsel of Record)
D. CHRISTOPHER LAUDERDALE
HAYNSWORTH BALDWIN JOHNSON & GREAVES LLC
918 South Pleasantburg Drive
Greenville, South Carolina 29607
(864) 271-7410
Attorneys for Amici Curiae.

April 2, 2004

Washington, D.C. • THIEL PRESS • (202) 328-3286

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to Rule 37.2(b) of the rules of the Supreme Court, the National Chicken Council ("NCC"), the American Meat Institute ("AMI"), and the National Association of Manufacturers ("the NAM") respectfully request leave to file the attached brief of amici curiae in support of Petitioner's request for a writ of certiorari. A letter of consent from Petitioner for filing of this brief has been filed with the Clerk of Court. Respondents have refused to consent to the filing of this brief.

In this case, the Ninth Circuit has determined that meat processing employees are entitled to compensation for time spent walking to their work stations. This decision is in direct conflict with that of other courts of appeals which have considered the compensability of such activities.

NCC is the primary trade organization representing the poultry industry in the United States. The member companies of NCC produce and process more than 90 percent of the broilers and fryer chickens marketed in the United States and employ in excess of 300,000 workers throughout the United States.

AMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. AMI member companies produce more than 95 percent of meat products available in the United States. There are more than 200,000 workers employed in the meat packing and processing industries in the United States. AMI has represented the interests of the meat packing and processing community since the Federal Meat Inspection Act was passed in 1906.

The NAM is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector in all 50 states.

The issue raised by this case regarding the compensability of walking time is extremely important to members of NCC, AMI, and the NAM and directly affects their operations. Many members of NCC, AMI, and the NAM are currently subject to inconsistent interpretations of the Fair Labor Standards Act, 29 U.S.C. §201-219 (Supp. 2000) ("FLSA"). The current split of authority among the circuits thus places significant burdens on the operations of amici's members. In fact, many members of NCC, AMI, and the NAM will be subject to conflicting interpretations of the FLSA within the scope of their own operations.

The amici wish to bring to the Court's attention the impact on their members and on other public and private employers of the split of authority on the compensability of the activities at issue in this case. NCC, AMI, and the NAM believe that they will provide the Court with particular insight into the issues presented by this case.

Respectfully submitted,

David R. Wylie

QUESTION PRESENTED

This brief for amici curiae will address the following question presented in the petition for writ of certiorari:

> **"Whether walking that occurs between compensable clothes-changing time and the time employees arrive at or depart from their actual work stations constitutes noncompensable 'walking . . . to and from the actual place of the performance of the principal activity' within the meaning of Section 4(a) [of the Portal-to-Portal Act]."**

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BRIEF OF AMICI CURIAE

REASONS FOR GRANTING THE WRIT

I.
THE NINTH CIRCUIT'S CONCLUSION THAT WALKING TIME IS COMPENSABLE UNDER THE FLSA IS IN CONFLICT WITH LONG-STANDING INTERPRETATIONS OF THE FLSA INCLUDING RECENT DECISIONS OF THE FIRST AND TENTH CIRCUITS.

The Ninth Circuit concluded that the employer in this case was required to compensate employees for time spent walking to their work stations after their first compensable donning activity and time spent walking from their work stations prior to their last compensable doffing activity. Pet. App. 18a-19a.[1] This conclusion is in conflict with opinions of the First and Tenth Circuits, is contrary to the plain language of Section 4 of the Portal-to-Portal Act amendment to the FLSA,[2] and also ignores the Secretary of Labor's ("Secretary") interpretive regulations. In fact, the Portal-to-Portal Act was enacted in direct response to a Supreme Court opinion that found such time to be compensable.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the definition of "work" under the FLSA was extended to include time spent by employees walking to their workstations and time spent in ancillary activities at their workstations before and after their shift. The *Mt. Clemens* Court concluded that walking to a workstation required an employee to be on the employer's premises and that without the employee

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[1] Pursuant to Rule 37.6, amici NCC, AMI, and the NAM state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than Amici, has made a monetary contribution to the preparation of submission of this brief.

[2] 29 U.S.C. § 254 (Supp. 2000).

walking to the workstation, the "productive aims of the employer" could not have been met. *Id.* at 691. The Court concluded that walking constituted "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 691-92 (footnote omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 164-66 (1945)).

Congressional response to the *Mt. Clemens* decision was immediate and unequivocal. In its next session in 1947, Congress passed the Portal-to-Portal Act with the express purpose of foreclosing "portal-to-portal" pay claims seeking compensation for the time from the instant an employee set foot on the employer's premises to the time of departure. Subsequent decisions have recognized that the Portal-to-Portal Act was a direct congressional response designed to nullify the *Mt. Clemens* decision. *See, e.g., Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) (stating that the Portal-to-Portal Act was designed to meet an emergency resulting from the employee claims arising from the *Mt. Clemens* decision, which, if allowed to continue, would have created "wholly unexpected liabilities" to employers that were "immense in amount"); *Tum v. Barber Foods, Inc.*, Nos. 02-1679; 02-1739 (1st Cir. Mar. 10, 2004) ("*Tum II*") (observing that the purpose of the Portal-to-Portal Act was "to exclude preliminary and postliminary waiting and walking time from compensability); *Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1323 (D. Kan. 1993), *modified and vacated in part by* 1 Wage & Hour Cas. 2d (BNA) 863 (D. Kan. June 2, 1993), *aff'd and remanded by* 38

F.3d 1123 (10th Cir. 1994) (stating that "[t]he legislative history of the Portal Act indicates that preliminary activities such as those held to be compensable in *Mt. Clemens* are no longer compensable under FLSA"); *United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986) (observing that intent of Portal-to-Portal Act was to prevent thousands of lawsuits to recover wages for time workers were in transit to and from workstations); *Northwestern-Hanna Fuel Co. v. McComb*, 166 F.2d 932 (8th Cir. 1948) (stating that it was common knowledge that congressional intent was to cut off vast amount of unforeseen damages some Supreme Court decisions created to the detriment of employers); *Bateman v. Ford Motor Co.*, 76 F. Supp. 178 (E.D. Mich. 1948), *aff'd sub nom. Fisch v. Gen. Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949) (stating that the "main purpose" of the Portal-to-Portal Act was to prevent employees' claims for time spent "walking, washing, punching the clock, changing clothes, etc."). In concluding that walking time is compensable in the present case, the Ninth Circuit has returned to pre-1947 reasoning and created an intolerable conflict of authority.

The Portal-to-Portal Act makes expressly clear that time spent walking, as well as time spent performing other preliminary activities, is "not compensable." The Act provides:

> **(a) Activities not compensable**
> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for

or on account of any of the following activities of such employee engaged in on or after May 14, 1947–

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. §254(a) (Supp. 2000).

This section of the Portal-to-Portal Act makes clear what the opinion of the Ninth Circuit ignores – that the Portal-to-Portal Act excludes not only "preliminary" and "postliminary" activities (see subsection (a)(2)), but also expressly excludes the "walking" time (see subsection (a)(1)) at issue in this litigation.

The First Circuit's recent rehearing decision in *Tum v. Barber Foods* (*Tum II*) makes clear that the Ninth Circuit's opinion in the present case creates a direct conflict with longstanding interpretations of the Portal-to-Portal Act. In a prior decision, a panel of the First Circuit found that walking time that followed compensable donning activities or preceded the last compensable doffing activity was not compensable under the Portal-to-Portal Act. *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003) ("*Tum I*"). The First Circuit found that "walking time [was] not automatically excluded from the purview of the Portal-to-Portal Act by virtue of following compensable doffing." *Id.* at 6. In this

case, the Ninth Circuit acknowledged the conflict between its opinion and that of the First Circuit in *Tum I*. Pet. App. at 19a.

Following *Tum I*, the employees filed a petition for rehearing. *Tum II*, slip op. at 2. In response to specific questions posed by the First Circuit, the Secretary of Labor, as an amicus curiae, submitted a brief setting forth the Secretary's position on the compensability of walking time that follows compensable donning or precedes the last compensable doffing activity. The First Circuit granted rehearing but rejected the Secretary's position that the workday began with an employee's first, and ended with an employee's last, principal activity. *Id.* at 14. The Secretary argued that any compensable donning activity should be considered the beginning of the workday and that the employee's last compensable doffing activity should be considered the conclusion of the workday. *Id.* at 12-13. Expressly recognizing the conflict with the Ninth Circuit's opinion in this case, the First Circuit rejected this expansion of compensable activities, finding that this reasoning would "undermine" the very purpose of the Portal-to-Portal Act. *Id.* at 14.

With regard to the interpretation of the FLSA urged by the Secretary, the First Circuit observed that "[t]he [S]ecretary urges an expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies the 'integral and indispensable' test itself started the workday, regardless of context." *Id.* at 12. Citing *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (7th Cir. 2002),[3] and *Reich v. IBP, Inc.*, 38 F.3d

[3] Fifth Circuit Local Rule 47.5.4 permits citation of unpublished decisions as persuasive authority.

1123 (10th Cir. 1994), the court noted that the Secretary's position has been rejected by two circuits and also expressly noted the conflict with the Ninth Circuit's opinion in the present case. *Id.* The First Circuit concluded that "the Secretary's present litigation position in our view, pushes so far that it threatens to undermine the Portal-to-Portal Act." *Tum II*, slip op. at 14.

The Ninth Circuit's conclusion in this case that donning and doffing constitute first and last principal activities and that the FLSA requires compensation for intervening time spent walking was expressly rejected by an earlier decision of the Tenth Circuit in *Reich v. IBP. Inc.* In *Reich*, the court held that

> [d]espite having found that putting on, cleaning, and taking off the unique personal protective gear was a compensable work activity, the district court nevertheless declined to hold that these actions were the first and last principal activities of the workday which would commence and toll the running of the timeclock, including "wait and walk time." The district court found that there existed considerable flexibility and personal discretion with regard to the time and speed that these activities took place. . . . Given these circumstances, the district court concluded that the workers should be paid on the basis of reasonable time to conduct these activities, not to include "wait and walk time." . . . We affirm . . . the denial of "wait and walk time" related to the above issues.

38 F.3d at 1127.[4] Similarly, as noted in *Tum II*, the Fifth Circuit affirmed without published opinion a decision dismissing claims by poultry workers for compensation for time spent walking to and from their work stations. *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d at 563 n.12.

[4] In *Reich v. IBP*, the donning and doffing activities of knife-wielding meat processing employees were found to be compensable, while similar activities of non-knife-wielding employees were found to be noncompensable. 38 F.3d at 1125-26. The Ninth Circuit's opinion in this case would create the following anomaly: knife-wielding employees, once they have performed the "first principal activity" of donning, would be compensated for time spent walking to the work station. Non-knife-wielding employees, however, would not be compensated for such walking time because their donning and doffing activities are not compensable. Any interpretation of the statute that yields such a result is clearly in conflict with the statute's plain meaning.

[footnote continued]

In other contexts, courts have concluded that even significant time spent walking or otherwise traveling to and from a work site is not compensable under the Portal-to-Portal Act, even where such travel occurs on the employer's property. In *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), locomotive operators employed on locks operated by the Panama Canal Company were required to be on board their locomotive at the beginning of their shift. Prior to their shift, the operators were required to check an assignment board and then walk 2 to 15 minutes to reach their locomotive, depending upon the location of the locomotive to which they were assigned. *Id.* at 1291. The court found that the principal activity of the operators was operation of the locomotive, and the actual place of performance of their work was the locomotive itself. *Id.* at 1294. The court found "little room for question" that the locomotive operators' claims for compensation for time spent walking to and from their locomotives were "precluded by the Portal-to-Portal Act." *Id.* at 1292. Similarly, in *Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806 (4th Cir. 1966), operating engineers and ironworkers employed in

the construction of the Chesapeake Bay bridge sought compensation for a daily boat ride to their work site, which required 15 minutes to 1 hour each way. The Fourth Circuit found that claims for such compensation were specifically precluded by Section 4(a) of the Portal-to-Portal Act. *Id.* at 808-09; 29 U.S.C. §254(a).

The Ninth Circuit's conclusion that walking time is compensable when it is incidental to compensable doning and doffing is also implicitly in conflict with the opinions of at least three courts of appeals that have rejected such reasoning in addressing the compensability of travel time for police dog handlers. For example, in *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2d Cir. 1994), dog handlers employed by the New York Transit Authority Police Department sought compensation for time spent commuting with their dogs. Each handler had sole responsibility for the care of his or her dog and was required to groom, feed, walk, train, house, and otherwise care for the dog. *Id.* at 648. The dog handlers were not permitted to travel to work using public transportation but were required to use their personal vehicles to transport the dogs to and from work. *Id.* The Second Circuit rejected the argument of the Secretary that because the handlers were required to perform compensable activities related to caring for the dogs, the travel time to and from work was, therefore, compensable. The court concluded that

> the time spent by handlers driving to and from work with their dogs, except to the extent that actual duties of care, feeding, training, walking or cleaning up occur during such commute, is not compensable work. Such true dog-care work occurring during the commute, however, is not exempted from compensation by the Portal-to-Portal Act.

Id. at 652. Both the Federal Circuit and the Sixth Circuit have reached similar conclusions. *See Bobo v. United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998), and *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999).

At least implicitly, these decisions reject the proposition that the performance of some compensable activity prior to or during travel time commences the workday and renders such travel time compensable. In contrast, under the reasoning of the Ninth Circuit, if a police dog handler's commute to work followed compensable dog care activities, the time spent commuting would be compensable. Under Section 4(a) of the Portal-to-Portal Act, there is no distinction between time spent "walking," "riding," or "traveling," to a workplace. 29 U.S.C. §254(a). This is precisely the type of "absurd" result the First Circuit in *Tum II* recognized would follow from the reasoning of the Secretary in that case and that of the Ninth Circuit in this case. In *Tum II*, the court observed that "[t]his extension overreaches and would lead to the absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at his home, starts his workday for FLSA purposes at 5:00 a.m. – even though he is not required to punch in to work and does not punch in until 8:00 a.m. This plainly cannot be what Congress intended." *Tum II*, slip op. at 12-13.

The Ninth Circuit's opinion in this case also rests on the erroneous assertion that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." Pet. App. at 19a. The First Circuit in *Tum II*, the Tenth Circuit in *Reich*

v. IBP, and the Second Circuit in *Reich v. N.Y. City Transit Auth.*, however, found that time spent traveling to or from the place where one's principal work is performed was not rendered compensable as a result of the previous or intermittent performance of compensable duties. Consistent with this reasoning, the Secretary's regulations additionally provide that

> [w]ashing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." . . . This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. §790.7, n.49 (Pet. App. 92a-93a).

Even if Section 4(a)(1) of the Portal-to-Portal Act did not expressly exclude walking time from compensable activities, the walking time at issue in this litigation would clearly be excluded as preliminary and postliminary activities. Section 4(a)(2) provides that "activities which are preliminary and postliminary to said principal activity or activities" are not compensable.

The regulations promulgated following the Portal-to-Portal Act allow no other interpretation of the statute. 29 C.F.R. Section 790.7 (2003) provides in relevant part:

> (b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" mean an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities.
>
> . . . .
>
> (f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities. . . .
>
> (g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

29 C.F.R. §790.7(b), (f), & (g) (footnote omitted). There is no meaningful distinction between the walking time at issue in this litigation and the example of "walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities" set forth in the Secretary's regulations.

The regulations make clear that only in extraordinary circumstances will activities that are normally preliminary or postliminary be considered integral and indispensable to a principal activity. Explicit support for this

reasoning is set forth in the Secretary's interpretive regulations. As an example of a walking activity that would be compensable, 29 C.F.R. Section 790.7(d) & (f) describes a logger who, while walking into the woods, would be required to carry heavy equipment and distinguishes as a noncompensable activity the carrying of "ordinary hand tools." The Ninth Circuit's finding here that such walking activity is compensable is, therefore, not only contrary to the statute, but also contrary to the relevant interpretive regulations promulgated by the Secretary.

The Ninth Circuit's reliance on *Steiner v. Mitchell*, 350 U.S. 247 (1956), to support its finding that the walking time at issue is compensable is clearly misplaced. In *Tum II*, the First Circuit found that "nothing in *Steiner* requires" the conclusion that compensable donning commences the workday and that the workday continues until the last act of compensable doffing is performed. *Tum II*, slip op. at 13. Concurring, Chief Judge Boudin recognized the implications of the Ninth Circuit's extension of *Steiner* noting that "the more serious problem for employers arises in cases such as this one by attempts to extend *Steiner* further to walking and waiting incident to such donning and doffing. This course may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal." *Id.* at 22-23.

In *Steiner*, the employees worked in a battery plant where their exposure to caustic and toxic chemicals required that they change clothes prior to their shift and shower in employer-provided facilities immediately after their shift. 350 U.S. at 248. The Court in *Steiner* recognized the general rule that clothes changing and showering are not compensable under "normal" circumstances.

Id. at 249. The Court found, however, that because of the uniquely hazardous conditions present, the time spent by employees showering and changing clothes was compensable. *Id.* at 249.

In its opinion in *Steiner*, the Sixth Circuit found that the showering and clothes-changing activities were compensable, specifically relying on findings by the district court that "[t]he use of sulphuric acid involves the probability of deteriorating the clothing and, in some cases, of burning the skin of those who have occasion to handle it" and that " '[s]torage battery manufacture is recognized by the experts as one of the most hazardous of the lead-using industries.' " *Steiner v. Mitchell*, 215 F.2d 171, 174 (6th Cir. 1954). Thus *Steiner*, like the regulations, makes clear that "preliminary" or "postliminary" activities will be found to be integral and indispensable to the principal activity only in narrow and unique circumstances.

The *Steiner* decision has been widely recognized as a narrow holding limited to its "unique facts." *See Tum II*, slip op. at 22 (Boudin, C.J., concurring) (observing that in *Steiner*, "the dangers were extreme and unique to the job"); *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (characterizing the *Steiner* decision as "very narrow and closely tied to the extreme facts presented by that case," including the "toxicity of the materials involved in manufacturing batteries and discussed at length the dangers inherent in working with such materials"); *see also Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 650 (noting that the Supreme Court found that the activities in *Steiner* were integral and indispensable "given the high risks to employee safety"); *Aguilar v. United States*, 36 Fed. Cl. 560, 566 (1996) (stating that "[t]he exception fashioned in *Steiner* narrowly construed the phrase 'principal activ-

ity' and found only a limited exception, expressly compelled by health, hygiene, and safety considerations. *Steiner* went to great lengths to emphasize that changing clothes and showering are not compensable under 'normal' circumstances").

Any potential health risks that might arguably be faced by meat processing workers are not comparable to those present in *Steiner,* in which employees were exposed to acid, lead, and other corrosive materials. *Steiner,* 350 U.S. at 249-50. The fact that, in the very limited circumstances present in such a hazardous work environment as that described in *Steiner,* pre-shift and post-shift activities can be found to be integral and indispensable to a principal activity in no way supports a conclusion that the walking time of employees in this case is compensable. It is clear that any walking associated with the donning and doffing activities at issue in this case are neither a principal activity nor integral and indispensable to a principal activity under *Steiner.*

The Ninth Circuit's expansion of the narrow holding of *Steiner* is in direct conflict with the First Circuit's opinion in *Tum II* and the Tenth Circuit's opinion in *Reich v. IBP.* The Ninth Circuit's opinion is also in conflict with other courts that have recognized the narrow scope of the exception created by the Court's holding in *Steiner.*

As Chief Judge Boudin recognized in *Tum II,* the Secretary's position in that case with respect to walking time (and the Ninth Circuit's holding in the present case) is "a substantial step beyond *Steiner*" and that "[a]s *Steiner* itself tempers the Portal-to-Portal Act's main thrust, probably its extension should be left to the Supreme Court." *Tum II,* slip op. at 26. In short, the opinion of the Ninth Circuit in this case seeks to expand the

exception of *Steiner* to the point that it will swallow the rule established by the Portal-to-Portal Act. The Ninth Circuit's reasoning further represents a return to the same expansive definition of "compensable activities" that prompted Congress, in 1947, to enact the Portal-to-Portal amendment.

II.
THE COMPENSABILITY OF WALKING TIME IS A RECURRING AND IMPORTANT QUESTION.

Claims by meat and poultry workers for compensation for time spent on pre-shift donning and post-shift doffing activities have recently become pervasive. *See, e.g., Tum II,* Nos. 02-1679, 02-1739 (1st Cir. Mar. 10, 2004); *De Ascencio v. Tyson Foods, Inc.,* 342 F.3d 301 (3d Cir 2003); *Reich v. Manfort, Inc.,* 144 F.3d 1329 (10th Cir. 1998); *Gonzalez v. Farmington Foods, Inc.,* 296 F. Supp. 2d 912 (N.D. Ill. 2003); *Anderson v. Pilgrim's Pride,* 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd.,* 44 Fed. Appx. 652; *Pressley v. Sanderson Farms, Inc.* 143 Lab Cas (CCH) ¶34,262 (S.D. Tex. Apr. 23, 2001), *aff'd without published opinion* 33 Fed. Appx. 705 (5th Cir. Mar. 7, 2002).

Throughout the history of the Portal-to-Portal Act, similar claims for pre-shift and post-shift activities have pervaded both private and public employment, and the importance of the question presented is underscored by the wide variety of employers that have faced such claims. *See, e.g., Bejil v. Ethicon Inc.,* 269 F.3d 477 (5th Cir. 2001) (claims for donning and doffing of outer garments by employees engaged in the manufacture of medical supplies); *Bagrowski v. Md. Port Auth.* 845 F. Supp. 1116 (D. Md. 1994) (claim by Port Authority police officers for time spent donning uniforms); *Reich v. N.Y.*

City Transit Auth., 45 F.3d 646 (2d Cir. 1995) (Transit Authority police officers asserted claims for dog handling duties and commuting time before and after their regular work shift); *Lindow v. United States*, 738 F.2d 1047 (9th Cir. 1984) (claims for pre-shift activities by employees of Army Corps of Engineers who operated hydroelectric facilities); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47 (8th Cir. 1984) (truck drivers asserted claim for pre-trip activities); *Dunlop v. City Elec., Inc.*, 527 F.2d 394 (5th Cir. 1976) (claims asserted by electricians for compensation for various pre-shift activities); *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972) (locomotive engineers sought compensation for walking time prior to shift); *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (5th Cir. 1969) (employees engaged in manufacture of carbon sought compensation for time spent performing post-shift activities); *Ralph v. Tidewater Constr. Co.*, 361 F.2d 806 (4th Cir. 1966) (operating engineers and iron workers employed in construction of Chesapeake Bay bridge sought compensation for daily boat trip to and from place of work); *Cherup v. Pittsburgh Plate Glass Co.*, 350 F. Supp. 386 (N.D. W. Va. 1972), *aff'd by* 480 F.2d 921 (4th Cir. 1973) (chlorine manufacturing employees sought compensation for pre- and post-shift clothes changing); and *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336 (D.N.J. 1962) (claims for pre-and post-shift activities of automotive manufacturing employees). Recent claims asserted against Honda Manufacturing of Alabama and Mercedes-Benz U.S. International for compensation for pre-shift and post-shift activities demonstrate the continued prevalence of these issues. Daily Labor Report (BNA) p. A-8 (Jan. 9, 2003); Daily Labor Report (BNA) p. A-5 (Apr. 4, 2003).

As a result of the holding of the Ninth Circuit in the present case, employers would additionally face claims for walking time following what is considered to be the first compensable pre-shift activity in any case and preceding the last compensable post-shift activity at the conclusion of the workday. The Ninth Circuit's opinion in this case, therefore, creates large and unforeseen liabilities for both public and private employers. In fact, any employer that employs individuals who wear a smock, a hairnet, work gloves, or other similar types of protective garments would be subject to claims for walking and travel time associated with obtaining, donning, doffing, or disposing of such garments. As the First Circuit recognized in *Tum II*, unless walking time associated with "ordinary" and "light" equipment is excluded by the Portal-to-Portal Act, "an almost endless number of activities that precipitate the employees' essential tasks would be compensable." *Tum II*, slip op. at 16. Under the holding of the Ninth Circuit in this case, police officers and other public employees required to wear some type of uniform will likely seek compensation for walking or travel time following allegedly compensable donning activities or preceding allegedly compensable doffing activities. The unanticipated burden such claims would create for state and local governments is alone arguably sufficient to warrant grant of certiorari in this case. The compensability of the walking time at issue in this case is, therefore, a question of broad importance.

The need for clarity and consistency in interpreting the Portal-to-Portal Act, as a general matter, has been frequently acknowledged. *See, e.g., Tum II*, slip op. at 22 (Boudin, C.J., concurring) (noting with regard to applications of *Steiner* that "the precedents are not uniform"). In fact, in 2002, the Solicitor of Labor commented with

regard to the compensability of pre-shift and post-shift activities that "the court decisions are in wide conflict." (Address by Solicitor of Labor before the Industrial Relations Research Association (June 20, 2002) (transcript available at http://216.239.37.104/search?q=cache:Sn1BIHiKP9wJ:www:irra.uiuc.edu/meetings/NPF2002/Scalia'sIRRASpeech6-20-02.pdf(last visited Mar. 24, 2004))).

If not definitively resolved, the conflict created by the Ninth Circuit's opinion in this case will leave both public and private employers subject to contradictory interpretations of the FLSA and subject to vast, unforeseen, and unpredictable liabilities that are arbitrarily dependent upon the location of their operations.

CONCLUSION

For all the foregoing reasons, the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

DAVID R. WYLIE
D. CHRISTOPHER LAUDERDALE
HAYNSWORTH BALDWIN
JOHNSON & GREAVES LLC
918 South Pleasantburg Drive
Greenville, South Carolina
29607
(864) 271-7410

Attorneys for Amici Curiae
National Chicken Council,
American Meat Institute,
and the
National Association of
Manufacturers.

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OPPOSITION

BRIEF

(3)

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No. 03-1238

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM RUTZICK*
KATHRYN GOATER
SCHROETER GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

DAVID MARK
LAW OFFICE OF DAVID MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Prof. Eduardo M. Penalver
Fordham Law School
140 W. 62nd St.
N.Y., N.Y. 10023
(212) 636-7016

Counsel for Respondents

* Counsel of Record

April 2, 2004

RPI Legal Printers, Seattle, Washington

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QUESTIONS PRESENTED

The questions presented by the parties are:

(1) Whether a writ of *certiorari* should be granted to resolve federal issues when resolution of those issues will not affect the judgment?

(2) Whether walking that occurs between compensable clothes-changing and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking ... to and from the actual place of performance of the principal activity ... **which occur either prior to [commencement], or subsequent to [cessation of] such principal activity or activities**" within the meaning of §4(a)?

(3) Whether *certiorari* should be granted to resolve supposed tension between Supreme Court opinions where the opinions and supposed tension were not argued to the Court of Appeals?

(4) Whether, after *United States v. Mead,* 533 U.S. 218 (2001), deference is due the Department of Labor's interpretation of the term "clothes" in Section 3(o), when that interpretation is embodied in an opinion letter issued by the Administrator of the Department's Wage and Hour Division, who is charged with administering and enforcing the FLSA, when Congress has provided that third parties may rely on such opinion letters, and when the opinion letter itself restores the agency's prior position?

Questions 1 and 3 are raised by respondents in this brief in opposition to the *certiorari* petition. Questions 2 and 4 are taken from IBP's petition, except that the **bold faced** type is added to complete the quotation of §4(a) of the Portal Act, 29 U.S.C. §254(a).

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, respondents state that there are two additional respondents/class representatives to the proceedings in the court whose judgment is sought to be reviewed and whose names do not appear in the caption. They are Virginia Alvarez and Maria Chavez.

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STATEMENT OF THE CASE

A. Factual Background.

In June 1998, plaintiffs brought suit alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§201-216, and of Washington State law, including *inter alia* the Washington Minimum Wage Act ("MWA"), RCW chapter 49.46, and meal and rest break regulations, WAC 296-126-092.

Plaintiffs are 815 beef slaughter and processing workers at the IBP plant in Pasco, Washington. These workers "are required to wear a variety of outer garments and personal protective equipment." Pet. App. 39a (District Court Findings hereinafter "D.Ct."). The required protective equipment for knife users – the majority of the plaintiffs – includes chain-link metal equipment such as aprons, aprons with leggings, vests, sleeves, and gloves. *See id.* at 39a-40a (D.Ct.).

The Court of Appeals explained: "At the start of a shift, Pasco plant employees must gather their assigned equipment, don that equipment in one of the Pasco plant's four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors. At the end of every shift, employees must clean, restore, and replace their tools and equipment, storing all of it [in the plant]." Pet. App. 3a-4a (Court of Appeals opinion hereinafter "Ct.App.").

IBP's "30-minute" unpaid meal breaks "begin when employees receive their last piece of meat and end when employees receive their next piece of meat." Pet. App. 41a (D.Ct.). During this unpaid meal break, employees must doff and don their protective equipment and tools in order to use the restroom and cafeteria. *Id.* Washington's WAC 296-126-092 "requires that '[e]mployees be allowed a meal

period of at least 30 minutes.'" Pet. App. 30a (Ct.App.) The District Court found that "IBP knew that meal breaks in Washington had to be 'at least 30 minutes,'" but "IBP never attempted to provide the employees with a 30-minute meal break." Pet. App. 80a (D.Ct.).

B. Trial Court Judgment and Alternative Meal Break Damages Finding.

The trial court awarded state and federal damages based on time studied donning, doffing and activity segments applied to each of 258 job classifications. Thus, employees in each particular job classification were awarded donning, doffing and activity time based on the job classification's equipment and tool work pre-shift, during the meal break and post-shift. Pet. App. 36a, 55a-58a & 77a-78a (D.Ct.).

State law meal break damages were hotly contested in the trial court and on appeal. Plaintiffs argued that breaks of less than 30 minutes had to be fully compensated under state law, while IBP argued that the remedy for a sub-30 minute meal break was the minutes worked.

The trial court awarded state law meal break damages only for the minutes worked during the meal break. Pet. App. 74a (D.Ct.). **However, it made alternate findings of fact on damages should it be reversed on appeal on state law meal break damages.** *Id.*

> The trial court's judgment awarded plaintiffs:
>
> $3,098,517 ... comprised of $1,751,126 in Fair Labor Standards Act ("FLSA") overtime damages, $156,344 in Washington Minimum Wage Act ("MWA") overtime damages for periods preceding the FLSA limitations period, $286,119 in MWA minimum wage damages, and $904,928 in rest break damages under Washington law....

Appendix 2a to this Brief In Opposition (hereinafter "Resp. App.").[1] The alternative meal break damages finding was as follows:

> If the Court is reversed on appeal on its meal break ruling and Plaintiffs are held entitled to 30 minutes compensation for each meal break during which work was performed, then Plaintiffs would be able to recover $7,297,517, . . . *comprised of $5,487,561 in MWA overtime damages, $905,028 [MWA] minimum wage damages, and $904,928 in rest break damages under Washington law....*

Pet. App. 74a (D.Ct.; italics added).[2]

C. The Ninth Circuit Reversal and Remand On State Law Meal Break Damages.

On appeal, the Washington State Attorney General filed an *amicus curiae* brief urging that any meal break of less than 30 minutes had to be fully compensated. The Ninth Circuit affirmed the trial court on all issues, except that it accepted plaintiffs' and the State *amicus curiae's* meal break arguments and reversed on meal break

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[1] Respondents' Appendix contains excerpts from the Court of Appeals' briefing on agency deference issues. The excerpts contain the Table of Contents and Table of Authorities to show which cases were cited and not cited. It also contains the text, with page numbers, containing the agency deference arguments. *See* Appendix Table of Contents *infra*.

[2] Plaintiffs recovered MWA minimum wage damages; they did not have an FLSA minimum wage claim. *See* Pet. App. 28a-30a (Ct.App).

damages. The Ninth Circuit "remand[ed] for recalculation of damages consistent with this full thirty-minute remuneration approach." Pet. App. 30a-32a (Ct.App.).

Because plaintiffs cannot recover overtime damages for the same overtime work under both the FLSA and MWA, and because plaintiffs' state-law damages (as modified on appeal) greatly exceed their FLSA damages, on remand plaintiffs will recover all of their damages under state law, without any FLSA recovery. *See* Pet. App. 74a (D.Ct.)(quoted above). Plaintiffs' MWA overtime damages – with full meal break compensation – will be $5.5 million, three times as much as the $1.75 million they could have recovered for FLSA overtime claims.

D. Department of Labor Opinion Letters and The Parties' Arguments as to Deference Thereto.

In December 1997, John R. Fraser, the Department of Labor's Acting Wage and Hour Division Administrator (hereinafter "DOL Administrator") issued an opinion letter that donning and doffing meatpacking industry wire mesh and related equipment did not involve FLSA §3(o), 29 U.S.C. §203(o), "changing clothes." Resp. App. 44a-47a. In January 2001, DOL Administrator T. Michael Kerr issued an opinion letter that reaffirmed the December 1997 opinion letter and rejected prospective-only application of the letter. Resp. App. 48a-50a.

IBP argued in its Court of Appeals opening brief that the Fraser and, by implication, Kerr opinion letters were entitled to little deference because they contradicted earlier positions of the Department of Labor ("DOL"):

> Thus, the Fraser reading of Section 3(o) conflicts with the Secretary's reading, and it is well established that "[a]n agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Resp. App. 11a.

In June 2002, DOL Administrator Tammy D. McCutchen issued an opinion letter rejecting the Fraser and Kerr opinion letters. Pet. App. 94a-100a. DOL's then-Solicitor filed a June 2002 *amicus curiae* brief which, relying on the McCutchen opinion letter, supported IBP's §3(o) position (and supported plaintiffs' walking time position). Resp. App. 12a-18a.[3]

Plaintiffs' opening brief to the Court of Appeals agreed with IBP that the DOL Administrators' opinion letters were of limited use because they conflicted with each other, citing *INS v. Cardoza-Fonseca*. Resp. App. 26a. In its reply brief, IBP argued the withdrawn opinion letters were not entitled to deference, *citing Christensen v. Harris County*, 529 U.S. 576, 587-588 (2000) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Resp.

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[3] The DOL Solicitor's *amicus curiae* brief did not cite case law on the issue of deference to be afforded the McCutchen § 3(o) opinion letter or the effect of prior inconsistent § 3(o) opinion letters. However, on the changing clothes issue, the Solicitor cited a regulation (29 C.F.R. § 790.8(c)), and wrote:

> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), holds that the Secretary's interpretative regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See also United States v. Mead*, 533 U.S. 218, 227-28 (2001). Resp. App. 18a n. 5.

App. 37a. IBP's reply brief did not argue for higher-than-*Christensen* deference for the 2002 opinion letter and did not cite *United States v. Mead,* 533 U.S. 218 (2001) or *Barnhart v. Walton,* 535 U.S. 212 (2002). *Id.* at 31a-37a.

The Ninth Circuit relied on *INS v. Cardoza-Fonseca* – the authority relied on by plaintiffs and IBP – in limiting the deference afforded the 2002 opinion letter, stating:

> As the Supreme Court has directed, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," *INS v. Cardoza-Fonseca*, 480 U.S. 421, n.30 (1987), and we reject the Secretary's new, inconsistent interpretation here.

Pet. App. at 17a (Ct.App.). Thus, neither the plaintiffs, IBP nor the DOL Solicitor made the argument for which IBP seeks *certiorari, i.e.,* that higher-than-*Christensen* deference was due the DOL Administrator's 2002 opinion letter pursuant to *United States v. Mead, supra,* or *Barnhart v. Walton, supra.*[4]

[4] In its Petition for Rehearing and Petition for Rehearing En Banc, pp. 11-12, IBP cites pre-*Christensen* Supreme Court authority for the propositions that (1) an agency's interpretation of its own regulations are given "substantial deference" and (2) prior inconsistent interpretations are not necessarily fatal. Resp. App. at 42a-43a. Thus, even when moving for rehearing, IBP did not make the *Mead v. United States* or *Barnhart v. Walton* argument which it now seeks to raise in its Petition For a Writ of Certiorari.

E. Walking Time Was Held Compensable To the Extent It Occurred After the First Principal Activity and Before the Last Principal Activity.

The District Court held that walking time is compensable when it occurs after the start of the workday and before the cessation of the workday, citing *inter alia* 29 C.F.R. §790.6(b). Pet. App. 53a-54a (D.Ct.)[5] It found that walking time from the locker room to the workstation and back met this test for compensability, stating:

> Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy. ... [T]he reasonable walking time from the locker to workstation and back ... is compensable for employees required to don and doff compensable personal protective equipment stored in their lockers, as is walking time thereafter, as it occurs during the "work day."

[5] 29 C.F.R. § 790.6(b) *inter alia* provides:

> "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period.

Pet. App. 90a-91a.

Id; accord, Pet. App. 58a (storing equipment is "integral and indispensable to the workers' duties") & 40a (slaughter employees "begin their day by picking up supplies at the supply room, then go to the locker room, where they retrieve their assigned protective equipment, steels and tools. Most slaughter employees don most of their equipment in the locker room").[6] The class members thus recovered between 2 to 3 minutes of locker to work station walk time per day. *See* Pet. App. 57a (D. Ct).

The Ninth Circuit affirmed the conclusion that walking time between locker room and work station was compensable, stating:

> The district court properly reasoned that the workday commenced with the performance of a preliminary activity that was "integral and indispensable" to the work, and the district court also properly determined that any activity occurring thereafter in the scope and course of employment was compensable. Thus, the district court included "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment" in its "compensable" time measure.

Pet. App. 18a (Ct.App.).

[6] The District Court recognized that:

> Walking time is compensable if it occurs after the start of the work day. 29 U.S.C. § 254(a). Walking time is excluded under the Portal to Portal Act only if it occurs "either prior to the time of any particular work day at which such employee commences or subsequent to the time on any particular work day at which he ceases, such principal activity or activities." *Id.*

Pet. App. 53a, 54a.

REASONS FOR DENYING THE PETITION

I. THE FEDERAL ISSUES RAISED IN THE PETITION WILL HAVE NO IMPACT ON THE JUDGMENT IN THIS CASE.[7]

The Supreme Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories,* 351 U.S. 292, 297-98 (1956). It follows that this Court should not accept *certiorari* when the issues it is being asked to decide would not have an impact on the judgment in that case. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 231 (8th ed. 2002).

None of the issues raised by IBP's Petition will have *any* impact on the judgment in this case. Regardless of any ruling in this Court on the issues raised by IBP, the plaintiffs herein will recover all of their damages *under state law.* That can be seen from the District Court's judgment and its alternative finding. The District Court

[7] IBP limited its petition to two issues while recognizing that "respondents' complaint and the opinions below, addressed several other FLSA and State law issues that are not the subject of this petition." Pet. 7 n. 3.

The FLSA §3(o) and Portal Act §4(a) issues do not impact MWA claims because "there is no §3(o) or Portal-to-Portal equivalent under State law." Pet. App. 71a (D.Ct.). IBP did not challenge this finding on appeal nor did it preserve an argument that federal law preempts Washington wage and hour law. *See* Resp. App. 28a & n.15 (Ct.App.).

held FLSA and MWA overtime recoveries were duplicative and limited plaintiffs to recovery under either the FLSA or MWA overtime for overlapping periods of time. *See* Pet. App. 80a (D.Ct.).

The original judgment awarded FLSA overtime damages of $1,751,126 for the period that FLSA and MWA overtime claims overlapped. Resp. App. 2a. Plaintiffs recovered MWA overtime damages of only $156,344, "for periods preceding the FLSA limitations period." *Id.*[8]

The trial court, however, made the alternative finding that would apply "if the Court is reversed on appeal on its meal break ruling and Plaintiffs are held entitled to 30 minutes compensation for each meal break during which work was performed ...." Pet. App. 74a. Under this alternative finding plaintiffs' recovery would be entirely under state law because the state overtime damages would be $5,487,561 which is far in excess of the $1,751,126 FLSA overtime damages. *See id.*

The Court of Appeals reversed the District Court on its state law meal break ruling, holding plaintiffs entitled to 30 minutes compensation for each meal break during which work was performed. Pet. App. 32a (Ct.App). Thus, plaintiffs' recovery is entirely supported by an independent and adequate state law ground. Indeed, the damages awarded to plaintiffs under state law will be the *only ones* set forth in the judgment on remand. Plaintiffs will receive a judgment based entirely on state law whether the Ninth Circuit is affirmed or is reversed on the issues raised in this petition. Any opinion this Court renders on the federal

[8] The FLSA claims exceeded the MWA claims because (1) plaintiffs recovered FLSA liquidated damages and (2) state meal break damages were limited to actual minutes worked, *i.e.*, the same as FLSA meal break damages. *See* Pet. App. 60a-61a, 74a, 78a-79a & 80a (D.Ct.).

issues raised by Petitioner will therefore be wholly advisory.

II. THE WALKING TIME ISSUE IS FACT BOUND AND NOT SUBJECT TO A MATURE CONFLICT AMONG THE CIRCUITS.

A. The Ninth and Tenth Circuits Agree That Pre- and Post-Production Walking Time May Be Compensable Under §4(a) of the Portal Act.

Section 4(a) of the Portal Act, 29 U.S.C. §254(a), excludes from hours worked only walking activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Pet. App. 88a. Federal regulations interpret §4(a) to mean that "periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. §790.6(a).

The Ninth Circuit herein and the Tenth Circuit, in *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th 1994), *affirming* 820 F.Supp. 1315 (D.Kan. 1993), each accepted the proposition that the walking is compensable between the first and last principal activity, even if the principal activity is not production work.

Herein, after reviewing evidence from a 20-day trial, the District Court found that the workday began and ended at the locker room, where the workers retrieved, donned, doffed and stored equipment and tools in accordance with IBP policy. Pet. App. 53a-54a & 57a-58a

(D.Ct.). As a result, plaintiffs recovered between 2 to 3 minutes of daily walk time between the locker and work station. *Id.* The Ninth Circuit affirmed the compensability of walk time. Pet. App. 18a-19a (Ct.App.). Based on findings from the evidence at trial, both the District Court and the Ninth Circuit agreed that walking time between the locker room and work stations was compensable because the workday had commenced and ended in the locker room. Both relied on 29 C.F.R. §790.6. Pet. App. 18a (Ct.App.) & 54a (D.Ct.).

In *Reich v. IBP, supra,* after a 3-day trial covering 11 IBP beef and pork plants, the trial court concluded that the first and last principal activity occurred at the knife room, when employees retrieved sharpened knives pre-shift and returned used knives post-shift. 820 F.Supp. at 1325. Therefore, the trial court held walk time between the knife room and work stations was compensable as occurring during the workday, citing *inter alia* 29 C.F.R. §790.6. *Id.* On appeal, the Tenth Circuit "agree[d] with the district court's determination on the issues of compensable working time ... for substantially the reasons set forth by the district court." 38 F.3d at 1125. Following remand and appeal, the Tenth Circuit affirmed the damages award which included three minutes of compensable pre-shift and post-shift walking time. *Metzler v. IBP, Inc.,* 127 F.3d 959, 963 & 966 (10th Cir. 1997), *aff'g Reich v. IBP,* 3 BNA Wage & Hour Cas.2d 324, 329 (D.Kan. 1996).

IBP argues, at Pet. 12, that "as the Tenth Circuit described it, even compensable clothes changing is not the 'first and last principal activit[y] of the workday which would commence and toll the running of the timeclock' such that all walking time between clothes changing and the work station is compensable. *Reich [v. IBP]*, 38 F.3d at 1127." In fact, the Tenth Circuit, 38 F.3d at 1127, was

describing what "the district court nevertheless declined to hold." The issue before the Tenth Circuit was not whether compensable clothes changing **could** start and end the workday, but rather whether to reverse trial court findings that were inconsistent with awarding locker to knife room walking time. *See id.*; 820 F.Supp. at 1321 (variations in were and when donning and doffing occurred) & 1326 (locker room use primarily for benefit of employees).

The Tenth Circuit affirmed fact-specific trial court findings about locker to knife room walking time; it did not adopt a legal principle that walking time was compensable only while production work was occurring. We know this because, as is discussed *supra,* the district court held pre- and post-production walking time from the knife room to the work station and back was compensable, and the Tenth Circuit affirmed these walking time findings twice -- in *Reich v. IBP* and again in *Metzler v. IBP.*

The Tenth Circuit and Ninth Circuit decisions are therefore fully consistent. Each upheld walking time awards based on its trial court's fact-bound findings regarding the workday's first and last principal activity. Each affirmed findings that treated non-production activity as starting and ending the workday for §4(a) walking purposes.

B. The First Circuit's Recent Opinion Presents an Immature Dispute Among the Circuits That Would Benefit From Further Development.

IBP argues that "the First Circuit squarely rejected the very reasoning the Ninth Circuit adopted" citing *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003). Pet. 12. However, the First Circuit withdrew the opinion relied on by IBP and replaced it with *Tum v. Barber Foods, Inc.*, ___ F.3d. ___, 2004 WL 437347 (1st Cir. March 10, 2004). The

new opinion does not squarely address the argument adopted by the Ninth Circuit that 29 C.F.R. §790.6 makes compensable walking time that occurs between the first and last principal activity. Pet. App. 18a (Ct.App.). Indeed, the First Circuit does not address 29 C.F.R. 790.6 at all. Rather, it relies largely on footnote 49 in 29 C.F.R. §790.7 without explaining the precise interpretation of that footnote or its connection to other regulations such as §790.6.[9]

Footnote 49 quotes from colloquy between Senators Cooper and McGrath to the effect that changing of clothes may in certain circumstances be an integral part of the employee's principal activity. It goes on to say that the fact that such clothes changing would be excluded from §4(a) of the Portal Act does "not necessarily mean, however," that travel between the clothes changing place and the actual place of performance of the specific work would also be excluded from §4(a) of the Portal Act. To say that something is not necessarily excluded means, at a minimum, that it may be excluded. The question then becomes under what circumstances will travel between the clothes changing place and the actual place of performance of the specific work be excluded from §4(a) of the Portal Act and under what circumstances will such travel be included as being subject to §4(a) of the Portal Act. Both the legislative history quoted at footnote 47 of §790.7 and

[9] *Tum* relies on *Anderson v. Pilgrim's Pride Corp.*, 147 F.Supp.2d 556, 563, (E.D. Tex. 2001), *affd. in an unpublished opinion,* 2002 WL 1396949 (5th Cir. 2002). However, the court concluded on the facts presented therein that "the clothes changing activity required of the line employees in *this* case is not 'integral and indispensable' to their principal jobs." (emphasis added) Without finding clothes changing to be a principal activity, no circuit court would find post-changing walking time to be compensable. The cases are fact specific.

the discussion at §790.6 help answer that question, but the First Circuit opinion did not refer to those sources.

In any event, any conflict between the conclusions reached by the First and Ninth Circuits is a narrow one that may well resolve itself with further circuit court review. Such review may reconcile 29 C.F.R. §790.6 and footnote 49 in 29 C.F.R. §790.7 by developing criteria for distinguishing between compensable and non-compensable walking time. Meanwhile, this does not present an issue of significant national importance requiring immediate Supreme Court consideration. The few opinions to date are intensely fact-bound. They involve only a few industries and small amounts of time. The circuits should be allowed an opportunity to consider each other's reasoning and to develop a consensus before this Court decides whether or not to take up the issue.[10]

[10] The concurrence by Chief Judge Boudin in *Tum* argues that:

> two positions are juxtaposed. One is the Secretary's mechanical combination of *Steiner* with a rigid "everything after is work" principle. The other is to treat required donning and doffing as compensable where more than de minimis but, where it is not, leaving both it and any associated walking and waiting time as non-compensable. Neither outcome is impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy.

2004 WL 437347 at 9 (emphasis in original.)

The concurrence further suggests that: "it may be time for the Supreme Court to have another look at the problem." *Id.* at 10. However, as discussed above, those are not the only two positions. An intermediate position can reasonably be found pursuant to 29 C.F.R. §§ 790.6 and 790.7. Moreover, any virtues of this Court reviewing the

C. The Ninth Circuit's Analysis Is Correct.

In any event, the Ninth Circuit correctly applied the applicable federal law. The exclusion in §4(a) of the Portal Act is limited by the statutory language to activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

A further source of authority is the Secretary of Labor's Portal Act interpretive regulations which were adopted in 1947 and are contained at 29 C.F.R. §§790.1 – 790.22. Section 790.4(b) states the basic rule that §4(a) activity is excluded only if it occurs before or after all principal activities.[11] The regulations draw heavily on the

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issues discussed in the concurrence, would be largely lost in accepting review in a case such as this one in which the result of this Court's analysis would not affect the judgment in the case.

[11] 29 C.F.R. § 790.4 states:

> (b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:
>
> (1) They constitute "walking, riding, or travelling" of the kind described in the statute, or other activities "preliminary" or "postliminary" to the "principal activity or activities" which the employee is employed to perform; and
>
> (2) **They take place before or after the performance of all the employee's "principal activities" in the workday ....**

(Emphasis added).

legislative history to the Portal Act, which is cited in footnotes. The colloquy between Senators Cooper and McGrath explains that the Portal Act term "principal activities" includes activities which are an integral part of a principal activity and is referred to directly or indirectly in footnotes 47, 49, 59, 60, 63, 64, 65, 66, and the accompanying text. This legislative history demonstrates that Congress intended to eliminate "from compensation walking, traveling, riding, and other activities which are <u>not</u> an integral part of the employment for which the worker is employer [sic]." 93 Cong. Rec. 2299 quoted at 29 C.F.R. §790.7 fn. 47. (Emphasis added.) This needs to be read together with 29 C.F.R. §790.6(b) which defines the workday "in general" to mean the period between commencement and completion of an employee's principal activity or activities and §790.4 which limits the Portal Act to activities that take place before or after all of the employee's principal activity in the workday.

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Supreme Court agreed with the Sixth Circuit's "holding that the term 'principal activity or activities' in Section 4 embraces all activities which are 'an integral and indispensable part of the principal activities,' and that the activities in question fall within this category." 350 U.S. at 252-53. The Supreme Court relied heavily on "the colloquy between several Senators and Senator Cooper, a sponsor of the bill and a member of the three-man subcommittee that held hearings of the Committee on the Judiciary which reported it." 352 U.S. at 254 & n.5 & 256-259 (appendix containing colloquy).

This Court's conclusion in *Steiner* was:

> We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production

> line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by §4(a)(1)."

352 U.S. at 255. IBP argues:

> *Steiner's* reference to activities "not specifically excluded by Section 4(a)(1)" can only be understood as a clarification that an "integral and indispensable" – and therefore compensable – activity does not render compensable all walking that occurs between that "integral and indispensable" activity and the work station.

Pet. 13. IBP reads too much into the "not specifically excluded" phrase. *Steiner* acknowledged that activities which are an integral and indispensable part of principal activities may nevertheless be specifically excluded by §4(a)(1), but was not attempting to analyze what §4(a)(1) means. *Steiner* never addressed the Secretary's regulations which define "workday" in terms of principal activities and which adopted the legislative history that "principal activities" include activities which are an integral part of a principal activity. 29 C.F.R. §790.6(b), §790.7, n. 47. There is thus no basis to conclude that in *Steiner* this Court was rejecting that interpretation.

In this case, the District Court found that work occurring in the locker was an integral and indispensable part of the principal activities and occurred during the workday and concluded that walking to and from the locker was therefore compensable. Pet. App. 40a, 54a & 58a (D.Ct.). These findings were based on the evidence and are

supported by the Secretary's interpretative regulations. *Steiner v. Mitchell* does not undermine the Secretary of Labor's Portal Act regulations, nor is it inconsistent with the Ninth Circuit's opinion herein.

III. CERTIORARI ON *MEAD* MODIFICATION OF *CHRISTENSEN* IS INAPPROPRIATE WHERE NOBODY ARGUED THE ISSUE AND THE NINTH CIRCUIT NEVER ADDRESSED IT.

This Court's practice is to decide cases only on grounds that were (a) raised *and* (b) considered in the Court of Appeals *and* (c) included in the question on which the Court granted *certiorari*. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Owasso Ind. School Dist. v. Falvo*, 534 U.S. 426, 431 (2002) As articulated in *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983):

> Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it.

IBP asks this Court to consider whether the Ninth Circuit gave proper deference to the 2002 opinion letter in light of *United States v. Mead*, *supra*. Pet. "i". IBP argues that *Mead*, *supra*, and *Barnhart v. Walton*, *supra*, modify *Christensen v. Harris County*, 529 U.S. 576 (2000), which held that less formal agency interpretations are not entitled to the deference set forth in *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Pet. 19-26.

Mead, Barnhart, and *Chevron* had all been decided prior to June, 2002 when the appellate briefing in this case began. Yet IBP never cited *Mead*, *Barnhart*, or *Chevron* in any Ninth Circuit briefing. To the contrary, IBP relied on *Christensen* having "recently clarified that an agency's

interpretation of a statute contained in an opinion letter does not warrant the usual deference given to agency interpretations … ." Resp. App. 10a (opening brief); *see also,* Resp. App. 37a (reply brief).

Either IBP was unaware that these later cases may have modified *Christensen* or it chose not to make the argument. In either event, these cases and arguments based thereon were not presented to the Ninth Circuit, and, consequently, the Ninth Circuit did not address them in its opinion below. Indeed, both sides used their opening briefs to argue that conflicting agency opinions have little weight, citing *INS v. Cardoza-Fonseca*, *supra*, Resp. App. 11a (IBP's opening brief) & 26a (Plaintiffs' opening brief). IBP failed to use its reply brief to argue that the newest conflicting opinion was entitled to greater deference under either *Mead* or *Barnhart.* Resp. App. 37a. Given the parties' argument it is hardly surprising that the Ninth Circuit relied on *INS v. Cardoza-Fonseca*. Pet. App. 17a n. 9.

Having lost in the Court of Appeals, IBP now argues for the first time that *Mead*, *Barnhart*, and *Chevron* – which it never cited to the Court of Appeals – create an issue which should be decided by this Court. Granting *certiorari* on this issue would shut the lower courts out of the decision making process, prevent this Court from getting the benefit of the Court of Appeals' analysis, and be inconsistent with this Court's practice described above.

IV. THERE IS NO CIRCUIT CONFLICT OVER §3(o) AND PROTECTIVE EQUIPMENT; THE NINTH CIRCUIT GAVE APPROPRIATE DEFERENCE TO THE 2002 OPINION LETTER.

The Ninth Circuit in *Alvarez* pointed out that no Court of Appeals decision had addressed the issue of whether putting on and taking off protective gear constitutes "changing clothes" as that term is used in the FLSA. *See* Pet. App. 14a-15a. (citing *Nguyen v. Excel Corp.*, 197 F.3d 200, 203 (5th Cir. 1999) and noting that the plaintiffs there raised a similar §3(o) safety gear claim but the Court did not reach the issue). IBP relies on *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) as the source of a circuit conflict on the §3(o) issue. Pet. 18. However, the clothes at issue in *Benjil* were sanitary garments such as lab coats, facial hair covers, and shoe covers. *Bejil*, 269 F.3d at 479. Those items are not fairly comparable to the mesh, scabbards, other protective equipment and tools which were the subject of the Ninth Circuit's analysis. Indeed, the District Court in this case held that items comparable to the items at issue in *Benjil*, *e.g.*, frocks, hair nets, boots and safety glasses *were* subject to §3(o). Pet. App. 56a-57a & n.9 (D.Ct.). Plaintiffs did not appeal that ruling. Thus, there is no conflict between the *Alvarez* and *Bejil* opinions.

Contrary to IBP's rather hyperbolic phrasing, the Ninth Circuit neither "utterly disregard[ed]" nor ignored the DOL's §3(o) interpretations. Pet. 26. Rather, the Court considered the interpretations together with applicable dictionary definitions, principles of statutory construction, and other regulations of the Secretary of Labor. Pet. App. 14a-17a (Ct.App.). Citing this Court's opinion in *INS v. Cardoza-Fonseca* (which was relied on by both parties),

the Court rejected "the Secretary's new, inconsistent interpretation here." *Id.*, n. 9. Both *United States v. Mead Corp.*, *supra* and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), list relevant principles a court should consider in determining what weight to be given to informal agency interpretation including the thoroughness of consideration, its consistency, and its power to persuade. *Skidmore*, 323 U.S. at 140; *Mead*, 533 U.S. at 235. The Ninth Circuit's analysis was entirely consistent with those principles.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

William Rutzick*
Kathryn Goater
SCHROETER, GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

David Mark
LAW OFFICE OF DAVID MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Prof. Eduardo M. Penalver
Fordham Law School
140 W. 62nd St.
N.Y., N.Y. 10023
(212) 636-7016

Counsel for Respondents

* Counsel of Record

April 2, 2004

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed September 14, 2001]

No. CT-98-5005-RHW

GABRIEL ALVAREZ et al.,

Plaintiffs,

v.

IBP, INC.,

Defendant.

JUDGMENT

This action came on for trial before this Court, the Honorable Robert H. Whaley, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED:

That the Plaintiffs, Gabriel Alvarez, *et al.* recover of the Defendant, IBP, Inc. the sum of $3,098,517, with interest thereon at the rate provided by 29 U.S.C. § 1961, 3.43%. This judgment is based on damages calculated through May 14, 2000, and is comprised of $1,751,126 in Fair Labor Standards Act ("FLSA") overtime damages, $156,344 in Washington Minimum Wage Act ("MWA") overtime damages for periods preceding the FLSA limitations period, $286,119 in MWA minimum wage damages, and $904,928 in rest break damages under Washington law (which includes rest break prejudgment interest).

The Court finds that Plaintiffs are entitled to their costs of action and reasonable attorneys' fees and costs under applicable state and federal law. Plaintiffs are directed to file a motion to establish these attorneys fees within 4 weeks of entry of this judgment and to file a cost bill with the Clerk pursuant to Fed. R. Civ. P. 54(d)(1).

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 14th day of September 2001.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed June 3, 2002

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, et al., individually and as class representatives,
Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC.,
Defendant/Appellant/Cross-Appellee.

CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
(Hon. Robert H. Whaley)
No. CT-98-5005-RHW

APPELLANT'S OPENING BRIEF

Michael B. King
Barbara J. Duffy
Douglas E. Smith
Nancy W. Anderson
LANE POWELL SPEARS LUBERSKY LLP

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* * * *

[20] To avoid this result, the District Court appears to have endorsed the reading given to Section 3(o) by Mr. John Frasier [sic], Acting Administrator of DOL's Wage and Hour Division, in an opinion letter issued in December 1997. Like the District Court, **[21]** Acting Administrator Frasier opined that protective "equipment" worn by beef processing plant employees does not constitute "clothes" under Section 3(o). See Ex. 64 (ER 274-77) (Frasier Letter). The Supreme Court has recently clarified that an agency's interpretation of a statute contained in an opinion letter does not warrant the usual deference given to agency interpretations, because such letters are not adopted after formal adjudication or rule-making procedures and therefore lack the force of law. Christensen v. Harris County, 529 U.S. 576, 587-88 (2000).. "[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" Id. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added)).

The Frasier letter's interpretation of Section 3(o) is not persuasive. To begin, the letter's reading of the term "clothes" contradicts the plain meaning of the statutory language. The Acting Administrator that his interpretation of "clothes" did comport with the word's plain meaning, asserting that "common usage dictates - that 'clothes' refer to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature." Ex. 64 (ER 277) (Frasier letter at 2). But (to take just one example from everyday life) a winter coat is also "generally worn over . . . apparel," and such coats are often "cumbersome; in **[22]** nature . . . ." That the Frasier letter's definition of "clothes" would exclude winter coats – and every other item of "covering for the human body" that is worn over other appeal and may be cumbersome in nature – should be

sufficient to demonstrate the near –frivolous quality of the letter's purported "plain meaning" interpretation of the term "clothes."

The Frasier letter's interpretation also conflicts with the Secretary of Labor's interpretation applied in the enforcement litigation against IBP. The Secretary expressly excluded IBP's union plants based on the application of Section 3(o). If the Secretary believed that protective clothing of the sort at issue here was not "clothes" under Section 3(o), why would the Secretary have excluded IBP's union plants from the enforcement action because of Section 3(o)? Plainly, the Secretary did consider the clothes at issue here to be "clothes" under Section 3(o), as well. Thus, the Frasier reading of Section 3(o) conflicts with the Secretary's reading, and it is well established that "[a]n agency interpretation . . . which. conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed June 13, 2002]

Nos. 02-35042; 02-35110

GABRIEL ALVAREZ, RANULFO GUTIERREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, ISMAEL RODRIQUEZ, VIRGINIA ALVAREZ and MARIA CHAVEZ, individually and as class representatives,

Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC., a Delaware corporation,

Defendant/Appellant/Cross-Appellee.

On Appeal from the
United States District Court
For The Eastern District of Washington

BRIEF FOR THE SECRETARY OF LABOR
AS *AMICUS CURIAE*

EUGENE SCALIA
Solicitor of Labor
STEVEN J. MANDEL
Associate Solicitor
PAUL L. FRIEDEN
Counsel for Appellate Litigation
ELLEN R. EDMOND
Attorney

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* * * *

[13] The Secretary has consistently interpreted the Portal Act to provide that changing clothes is compensable as an integral part of the employee's principal activity if the principal activity cannot be performed without putting on and taking off the clothes **[14]** on the employer's premises, i.e., if it is not merely a "convenience" to the employee. *See* 29 C.F.R. 790.8(c) (first promulgated at 12 Fed. Reg. 7655 (Nov. 18, 1947)).[5] The interpretative regulations further explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." *Id.* at 790.8(c) n.65. *See also* 29 C.F.R. 790.7(g) n.49 ("Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's principal activity."). The Supreme Court in *Steiner* specifically upheld these regulations, noting that they were ratified by Congress in 1949 when former § 16(c) of the FLSA was enacted. *See* 250 U.S. at 255 nn.8 and 9. Section 16(c) provided that existing Wage-Hour regulations or interpretations, not inconsistent with the amendments, remained in effect. *See* Note following 29 U.S.C. 208, 63 Stat. 920 (1949) (footnote omitted).

* * * *

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[5] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), holds that the Secretary's interpretative regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See also United States v. Mead*, 533 U.S. 218, 227-28 (2001).

APPENDIX D

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed July 22, 2002]

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, RANULFO GUTIERREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, ISMAEL RODRIQUEZ, VIRGINIA ALVAREZ and MARIA CHAVEZ, individually and as class representatives,

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EASTERN DISTRICT OF WASHINGTON
(District Court No. CT-98-5005-RHW)

PLAINTIFFS/APPELLEES/
CROSS-APPELLANTS' BRIEF

William Rutzick*
Kathryn Goater
SCHROETER, GOLDMARK & BENDER

David Mark
LAW OFFICE OF DAVID MARK

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* * * *

[19] The June 2002 opinion letter (Appendix A to Amicus Brief) is the work of a new Administrator appointed by a new administration. It squarely conflicts with **[20]** the 1997 and 2001 opinion letters issued by prior Administrators in a prior administration. (Exhibit 64, ER 275-277; CR 639, SER 74) Both sides now have an opinion letter. Under *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), the net effect of these conflicting interpretations is to cancel them out as useful sources of statutory interpretation apart from their own persuasive force. The new interpretation is of little, if any, persuasive force for the reasons discussed above. (Footnote omitted.)

* * * *

APPENDIX E

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed October 4, 2002]

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, et al., individually
and as class representatives,
Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC.,
Defendant/Appellant/Cross-Appellee.

CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
(Hon. Robert H. Whaley)
No. CT-98-5005-RHW

IBP, INC.'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

Michael B. King
Barbara J. Duffy
Douglas E. Smith
Nancy W. Anderson
LANE POWELL SPEARS LUBERSKY LLP

William A. Norris
Joel M. Cohn
Alison L. Gray
AKIN GRUMP STRAUSS HAUER & FELD LLP

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* * * *

[8] Plaintiffs seek to diminish the importance of the June 6, 2002 letter by asserting "[b]oth sides now have an opinion letter." Pltfs' br. at 20. However, this assertion ignores that the earlier letters have been withdrawn, and were never entitled to any deference even before the June 6, 2002 letter. The earlier letters represented a sharp departure from prior DOL practice and case law rejecting any distinction under section 3(o) between "clothing" and so-called "safety equipment." *See* Appendix A (June 6, 2002 DOL Op. Letter at 1) ("[T]he construction of section 3(o) enunciated in the December 3, 1997 Opinion Letter had never previously been put forward by the Administrator;" numerous DOL officials historically applied section 3(o) to exclude "from hours worked the time spent by employees putting on, taking off and cleaning protective equipment."); *Saunders*, *supra*. The withdrawn letters are also inconsistent with the plain and unambiguous statutory language, and conflict with prior case law. For these reasons, they are not entitled to any deference. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Plaintiffs' continued reliance on the December 1997 opinion letter therefore is completely misplaced.

* * * *

APPENDIX F

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed August 25, 2003]

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, et al., individually and as class representatives,
Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC.,
Defendant/Appellant/Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
HON. ROBERT H. WHALEY, JUDGE
CASE NO. CT-98-5005-RHW

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

William A. Norris
Joel M. Cohn
Alison L. Gray
AKIN GRUMP STRAUSS
HAUER & FELD LLP

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* * * *

[11] The panel was required to treat the DOL's interpretation of the statute with "substantial deference." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). As the Supreme Court has explained, [the court's] task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. . .." Id. (citations and quotations omitted). Substantial deference-is especially warranted when, as here, **[12]** "the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. '" Id. (citations omitted).[6]

The panel did not cite *Thomas Jefferson* or accord the DOL's interpretation any deference, let alone "substantial" deference. Instead, it dismissed the DOL's position on the ground the agency took a different position in a 1997 letter that, has since been withdrawn. The panel adopted this 1997 position - one the DOL characterizes as contrary to the agency's otherwise consistent interpretation of section 3(o) (Addendum A at 1) - in reliance on a single case, INS *v. Cardoza-*

---

[6] This Court has repeatedly upheld the rule that an "agency's interpretation of regulations it is charged with administering is entitled to a high degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with the regulation." *E.g., Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214,1218 (9th Cir. 2002); *Rainsong Co. v. Federal Energy Reg. Comm 'n.*, 106 F.3d 269,272 (9th Cir. 1997); *Rendleman v. Shalala*, 21 F.3d 957, 961 (9th Cir. 1994).

Fonseca, 480 U.S. 421, 446 n.3 (1987). Slip op. at 10707 n.9. The *Cardoza-Fonseca* court observed that inconsistent agency interpretations may be entitled to less judicial deference than consistently held positions, in a case where the agency proffered a view not only inconsistent with its former interpretation, but at odds with the plain language of the statute at issue there. 480 U.S. at 446. By contrast, **[13]** the plain language of section 3(o) makes no distinction between clothing that is protective and clothing that is not.

Nor did the panel cite more recent Supreme Court cases clarifying that shifts in policy are not fatal to the legitimacy of an administrator's interpretation. *In Rust v. Sullivan,* 500 U.S. 173 (1991), for example, the Court stated that it had "rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." Id. at 186 (citation omitted). "[A] revised interpretation deserves deference" because! "'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'" Id. (citations omitted); *see also Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)* ("The mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be 'arbitrary, capricious [or] are, abuse of discretion.' But if these pitfalls are avoided, change is not invalidating[.]") (citations omitted).

* * * *

APPENDIX G

U. S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Dec. 3, 1997 [SEAL]

George R. Murphy, Esq.
General Counsel
United Food & Commercial Workers
International Union
1775 K Street, N.W.
Washington, D.C. 20006-1599

Roger J. Miller, Esq.
McGrath, North, Mullin & Kratz, P.C.
Suite 1400 One Central Park Plaza
222 South Fifteenth Street
Omaha, Nebraska 68102

Dear Mr. Murphy and Mr. Miller:

This responds to your respective requests for an opinion concerning the application of section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203 (o), to employees in the meat packing industry. According to your letter, the employees in question perform the following preliminary and postliminary activities: sharpening knives, waiting in line at wash stations, cleaning equipment, and putting on

and taking off required safety gear. You specifically ask whether section 3(0) allows for the exclusion of any of these activities from hours worked pursuant to the express terms or by custom or practice under a collective bargaining agreement.

Section 3(o) of the FLSA states as follows:

> Hours worked. – In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. 203 (o) (emphasis added). Since section 3 (o) provides an exemption from the broad, remedial provisions of the FLSA, it must be read narrowly. *See Arnold v. Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960).

The putting. on, taking off, and washing of protective safety equipment are compensable activities under the FLSA if they are integral to an employee's principal activities, regardless of the fact that they may be performed either before or after the employee's regular work shift. *See Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (where court concluded that the time spent by employees in putting on, taking off, and washing protective safety equipment that is unique to the

meat packing industry -- e.g., a mesh apron, a plastic belly guard, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, a chain belt, a weight belt, a scabbard, and shin guards -- was compensable). *See generally* 29 C.F.R. 790.8(b) and (c). It is our view that by its very terms section 3(o) does not apply to the putting on, taking off, and washing of protective safety equipment, and, therefore, time spent on these otherwise compensable activities cannot be excluded from hours worked pursuant to the express terms or the custom or practice under a collective bargaining agreement.

The plain meaning of "clothes" in section 3(o) does not encompass protective safety equipment; common usage dictates that "clothes" refer to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature. In regard to the meaning of "washing," the legislative history specifically states that the term refers only to washing oneself. The conference agreement limited the section 3(o) exemption "to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each workday." *See* H.R. Conf. Rep. No 1453 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2251, 2255 (emphasis added). *See also* 95 Cong. Rec. 14,875 (1949) (speaking of the conference agreement as limiting the application of section 3(o) "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday") (emphasis added); 29 C.F.R.

790.7(g) (discussing preliminary and postliminary activities such as "washing up or showering," which, under the Portal-to-Portal Act, would not generally be considered to be compensable unless deemed to be an integral part of an employee's principal activity) (emphasis added). Thus, section 3(o) cannot be read so broadly as to include the cleaning of protective safety equipment.

Therefore, the phrase "changing clothes or washing" in section 3(o) does not include the putting on, taking off, or washing of that protective safety equipment utilized in the meat packing industry which is integral to the performance of an employee's principal activity. Moreover, the phrase clearly does not encompass the sharpening of knives.

We trust that the above is responsive to your individual inquiries.

Sincerely,

/s/John R. Fraser
John R. Fraser
Acting Administrator

APPENDIX H
2001 WL 58864 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
January 15, 2001

This responds to your request that we clarify opinion letters issued on December 3, 1997, and February 18 1998, interpreting Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. 203(0). As you know, we met with representatives of the *** to discuss issues you raised relating to implementation of the interpretation expressed in the opinion letters. We have carefully considered the recommendations offered during those meetings as well as the supporting documents submitted by the parties.

As we have previously indicated, prior to issuing the December 3, 1997, opinion letter, the Administrator of the Wage and Hour Division had never issued a written interpretation or implemented an administrative practice or enforcement policy regarding the proper construction of the phrase "changing clothes and washing" in Section 3(0) of the FLSA. Some regional and district officials of the Wage and Hour Division and the Office of the Solicitor, however, in their enforcement of some cases, chose to apply Section 3(0) if a bona fide collective bargaining agreement excluded from hours worked the time spent by employees putting on, taking off and cleaning protective equipment.

Accordingly, when the Department filed suit under the FLSA against Excel Corporation in July 1998, on behalf of unionized meatpacking employees working at the company's Beardstown, Illinois, plant (later amended to include Excel's Ft. Morgan, Colorado, plant) we exercised prosecutorial discretion to seek back wages starting from March 1998 -- the date when Excel received a copy of the December 3, 1997, opinion. We will adhere to an enforcement position to seek relief for unionized meatpacking employees for their time spent putting on, talking off and washing protective equipment beginning from the date the employer received or should have received notice of the December 3, 1997, opinion. We do not believe it is appropriate, however, further to limit the relief we may seek to work performed after expiration of collective bargaining agreements in effect on December 3, 1997, that excluded these pre-shift and post-shift activities from compensable time. This exercise of prosecutorial discretion does not imply that the opinion letters constituted a change in the law or in the Administrator's interpretation of the law.

In addition, I would like to take this opportunity to reiterate, as we discussed in our earlier meetings, that under the FLSA and the Portal-to-Portal Act, it is the Department's longstanding position that, as a general matter, compensable hours worked include all time from the moment each employee performs the first principal activity of the employee's workday until the last principal activity is concluded, less any bona fide meal periods or bona fide off-duty time. An employer must compensate its employees for any activity that is an integral and indispensable part of the employee's principal activities, including the putting on, taking off and cleaning of personal protective equipment, clothing or gear that is required by law, by rules of the

employer or by the nature of the work. It should also be noted that the meal period may not include any time performing "work," and that time spent donning and doffing of personal protective equipment, clothing or gear before or after the meal period is compensable.

Also, a number of meatpacking companies have asked the Department if it would be permissible to pay employees wages based on an average amount of time that all employees work. I would like to reiterate that in order to comply with the FLSA and its implementing regulations (see 29 C.F.R. 516.2), a company must record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing or gear.

I look forward to working together to achieve compliance in this industry, and appreciate your interest in these important matters.

Sincerely,

T. Michael Kerr Administrator

APPENDIX I

29 CFR § 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1974, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were:

(1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable worktime, independently of contract, custom, or practice; [19] and

(2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute ``walking, riding, or traveling'' of the kind described in the statute, or other activities ``preliminary'' or ``postliminary'' to the ``principal activity or activities'' which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's ``principal activities'' in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that ``the employer shall not be so relieved'' if such activities are so compensable; [21] it does not matter in such a situation that they are so-called ``portal-to-portal'' activities.[22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for; [23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.[24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, ``preliminary'' or ``postliminary'' activities which take place outside the workday ``before the morning whistle'' or ``after the evening whistle'' are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day.[25]

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[16] The Fair Labor Standards Act, as amended, requires the payment of the applicable minimum wage for all hours worked and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employees regular rate of pay, unless a specific exemption applies.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation together with an additional equal amount (subject to section 11 of the Portal-to-

Portal Act, discussed below in Sec. 790.22) as liquidated damages (section 16(b) of the Act); and, if his Act or omission is willful, subjects him to criminal penalties (section 16(a) of the Act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the Act).

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in ``physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (Tennessee Coal Iron & R.R. Co. v. Muscoda Local, 321 U.S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323, U.S. 134, 136-137).

[19] Portal Act, section 1: Senate Report, pp. 41, 42, 46-49; Conference Report, pp. 12, 13; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270; statements of Senator Donnell, 93 Cong. Rec. 2089, 2121, 2122, 2181, 2182, 2362, 2363; statements of Senator Cooper, 93 Cong. Rec. 2292-2300.

[20] Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270.

[21] Section 4(b) of the Act (quoted in Sec. 790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hakes, 93 Cong. Rec. 2181-2182; colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298, cf. colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[23] Statements of Senator Donnell, 93 Cong. Rec. 2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298, 2299.

[24] Statements of Senator Donnell, 93 Cong. Rec. 2181, 2182.

[25] Conference Report, pp. 12, 13. See also Sec. 790.12.

29 CFR § 790.6 Periods within the ``workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the ``workday" proper, roughly described as the period ``from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before ``preliminary" or ``postliminary" activities are excluded from hours worked is that they `occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the ``workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the ``workday" in activities of the kind described in section 4.[37]

(b) ``Workday'' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the ``workday'', and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his ``workday'' commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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[34] The report of the Senate Judiciary Committee states (p. 47), ``Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section.''

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in Secs. 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

29 CFR §790.7 ``Preliminary'' and ``postliminary'' activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in ``preliminary'' or ``postliminary'' activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not ``preliminary'' or ``postliminary'' activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a ``preliminary'' or ``postliminary'' activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words ``preliminary activity'' mean an activity engaged in by an employee before the commencement of his ``principal'' activity or activities, and the words ``postliminary activity'' means an activity engaged in by an employee after the completion of his ``principal'' activity or activities. No categorical list of ``preliminary'' and ``postliminary'' activities except those named in the Act can be made, since activities which under one set of

circumstances may be ``preliminary'' or ``postliminary'' activities, may under other conditions be ``principal'' activities. The following ``preliminary'' or ``postliminary'' activities are expressly mentioned in the Act: ``Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform.'' [43]

(c) The statutory language and the legislative history indicate that the ``walking, riding or traveling'' to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of ``walking, riding or traveling'' described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be ``walking, riding, or traveling'' of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue

to be determined by principles established under this Act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel ``to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as ``Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a ``trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act

has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered ``preliminary" or ``postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered ``preliminary" or ``postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a ``preliminary" or ``postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has

elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

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[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also Secs. 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also Sec. 790.6.

[42] See Sec. 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

[44] These conclusions are supported by the limitation, ``to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term ``walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all ``preliminary" and ``postliminary" activities to the effect that the Act may affect them only if they occur ``prior to" or ``subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act ``does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

[47] Senator Cooper, after explaining that the ``principal" activities referred to include activities which are an integral part of a ``principal" activity (Senate Report, pp. 47, 48), that is, those which ``are

indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: ``We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's ``principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and Sec. 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See Skidmore v. Swift & Co., 323 U.S. 134, 7 WHR 1165.

29 CFR §790.8 ``Principal'' activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the ``principal'' activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is ``preliminary or postliminary to (the) principal activity or activities'' which the employee is employed to perform, it is generally necessary to determine what are such ``principal'' activities.[54]

The use by Congress of the plural form ``activities'' in the statute makes it clear that in order for an activity to be a ``principal'' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; [55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several ``principal'' activities during the workday. The ``principal'' activities referred to in the statute are activities which the employee is ``employed to perform''; [56] they do not include noncompensable ``walking, riding, or traveling'' of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute ``principal activities'' was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that ``the realities of industrial life,'' rather than arbitrary standards, ``are intended to be applied in defining the term `principal activity or activities','' and that these words should ``be interpreted with due regard to generally established compensation practices in the particular industry and trade.''[58] The legislative history further indicates that Congress intended the words ``principal activities'' to be construed liberally in the light

of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered ``sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.'' [60]

(b) The term ``principal activities'' includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee. Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a

chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ``preliminary" or ``postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

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[53] See Secs. 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain ``preliminary" and ``postliminary" activities are expressly mentioned in the statute (see Sec. 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as ``principal" activities
is necessary.

[55] Cf. Edward F. Allison Co., Inc. v. Commissioner of Internal Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that ``There was no definite purpose in using the words `30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

April 13, 2004

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REPLY BRIEF

As IBP, inc. ("IBP") explained in its petition, this case presents two fundamental and recurring questions of federal law, both of which are ripe for the Court's consideration.

1.a. There is an acknowledged and irreconcilable conflict among the courts of appeals on the important issue of whether employees are entitled to compensation under the Portal Act for "walking time" between arguably compensable pre- and post-shift clothes-changing and the actual work station. See Pet. 11-17. Since the petition was filed, that split has become even more definitive. The First Circuit recently released its opinion on rehearing in *Tum* v. *Barber Foods, Inc.*, in which it affirmed its earlier decision that such "walking time is not compensable." 360 F.3d 274, 281 (1st Cir. 2004). In a concurring opinion, Chief Judge Boudin expressly "juxtaposed" the conflicting positions of the circuits, explaining that the First Circuit has now aligned itself with the Fifth and Tenth Circuits—and in opposition to the Ninth Circuit's decision in this case—in holding that the walking time at issue here is not compensable. *Id.* at 285 & nn.9 & 10 (Boudin, C.J., concurring) (citing *Reich* v. *IBP, Inc.*, 38 F.3d. 1123, 1127 (10th Cir. 1994), and *Anderson* v. *Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002)).

Notwithstanding this plain and acknowledged conflict, respondents contend that there is no real, developed split. Their suggestion that the decisions of the Ninth and Tenth Circuits are "fully consistent," Opp. 11-13, is wishful thinking. In *Reich*, the Tenth Circuit did not merely describe the district court's ruling that the time for which workers should be paid is "*not* to include '. . . walk time,'" *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994) (emphasis added), it expressly *affirmed* that ruling. See *id.* ("[w]e affirm . . . the *denial of* '. . . walk time'" that occurs post-

donning and pre-doffing) (emphasis added). In his concurring opinion in *Tum*, Chief Judge Boudin likewise recognized that *Reich* "uphold[s] the denial of 'walk and wait' time related to donning and doffing" and thus directly conflicts with the Ninth Circuit's holding below. 360 F.3d at 285 n.10 (Boudin, C.J., concurring).[1] Not only is respondents' attempt to reconcile the holdings of the Ninth and Tenth Circuits completely untenable, it simply ignores the irrefutable split of authority between the decision below and the decisions of the First (and Fifth) Circuits.

Respondents' contention that the walking time issue is too "fact-bound" to generate a split of authority is equally baseless. Opp. 11, 13. The compensability of walking time that occurs between compensable clothes-changing and the work station is a pure question of law. The answer to that legal question turns on the meaning of a statute, not on any factual variations in the industrial settings in which the issue may arise. Thus, while the *amount* of time employees spend walking between compensable clothes-changing and the work station may vary according to the industry and the particular configuration of a plant, the *compensability* of such time depends entirely on the proper construction of the Portal Act.

Nor is it true that the current split is "[i]mmature." Opp. 13, 15 n.10 (suggesting that an unspecified "intermediate position" may yet develop in the circuits). The "walking time" issue already has received detailed attention and definitive resolutions from a number of circuits, including a

[1] Contrary to respondents' claim, the district court's separate holding that travel from the knife room to the work station is compensable, *Reich* v. *IBP, Inc.*, 3 Wage & Hour Cas. 2d (BNA) 324, 329 (D. Kan. 1996), *aff'd on other grounds*, *Metzler* v. *IBP, Inc.*, 127 F.3d 959, 963, 966 (10th Cir. 1997), does not eliminate this clear conflict. That issue was neither appealed nor discussed in the Tenth Circuit's affirmance, and thus in no way alters the Tenth Circuit's express holding in *Reich* that walking time that occurs post-donning and pre-doffing—the very walking time at issue in this case—is not compensable.

disposition on rehearing in the First Circuit. Given the existing and acknowledged disagreement among the courts of appeals, there is no emerging "'right' answer short of" this Court's involvement. 360 F.3d at 283 (Boudin, C.J., concurring).[2]

It is clear, moreover, that the Ninth Circuit's isolated view is *not* the "right" answer. In his thoughtful concurrence in *Tum*, Chief Judge Boudin explained that the Ninth Circuit's analysis improperly "combin[es] *Steiner*'s verbal formula—'integral and indispensable'—with another settled principle: that once the workday has begun with the first principal activity, anything else until the workday ends is compensable unless the employee is essentially on his own." *Tum*, 360 F.3d 284-85. This approach "undermin[es] Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability," *id.* at 281, and is inconsistent with the Act's legislative history, which provides "examples of events excluded from compensable work—such as time spent waiting to punch in and time spent walking from plant gate to work bench—that appear at odds" with the Ninth Circuit's interpretation. *Id.* at 285 (Boudin, C.J., concurring). The majority opinion also concluded that the Ninth Circuit's approach leads to "absurd result[s]." See *id.* at 280-81.

Contrary to respondents' claim, nothing in this Court's decision in *Steiner* justifies the decision below. Opp. 17-19. "*Steiner* concerned only time spent in the donning and doffing of special protective equipment" and "did not purport to say that all time walking" with respect to that donning and doffing is compensable. *Tum*, 360 F.3d at 281 n.5. Indeed, as petitioner previously explained, *Steiner*'s statement that time

[2] The circuits' differing focuses on the various interpretive regulations and legislative history, Opp. 13-15, further emphasizes the difficulty they have experienced in finding a single answer to the walking time question.

is compensable if it is (1) spent on activities that are "'integral and indispensable'" to principal activities and (2) not excluded by Section 4(a), necessarily excludes the walking time at issue here. See Pet. 13. In all events, any question about "how far *Steiner* has qualified the statute" is a matter that only this Court can finally resolve. *Tum*, 360 F.3d at 286 (Boudin, C.J., concurring).

Respondents' contention that the "walking time" issue "does not present an issue of significant national importance" requiring the Court's review, Opp. 15, defies belief. As Chief Judge Boudin observed, the kind of expansive interpretation adopted by the Ninth Circuit here "bear[s] an uncanny resemblance to that which prompted the Portal-to-Portal Act." 360 F.3d at 286. As detailed in the petition, in enacting the Portal Act, Congress found that a breathtaking array of harms can attend uncertainty and overbreadth concerning the compensability of "walking time," including the "financial ruin of many employers"; "extended and continuous uncertainty on the part of industry"; "gross inequity of competitive conditions between employers and between industries"; "interfere[nce] with" "voluntary collective bargaining"; as well as courts nationwide "be[ing] burdened with excessive and needless litigation." 29 U.S.C. § 251(a). The submission of the *amicus* brief by the the National Chicken Council, the American Meat Institute, and the National Association of Manufacturers confirms that the question presented in this case has wide-ranging importance for all employees and their employers whose expectations are undermined and upset by uncertainty about the compensation requirements of federal law.

b. Unable to cast doubt on the important and acknowledged circuit split presented here, respondents suggest—for the first time in this litigation—that review should be denied because the federal "walking time" issue will have no impact on the judgment: "[r]egardless of any ruling in this Court on the issues raised by IBP, the plaintiffs herein will recover all

of their damages *under state law*." Opp. 9. This assertion is wrong.

Even if respondents' state and federal claims do overlap and respondents ultimately elect to collect damages under the former, that election will not in any way alter or eliminate the judgment for which petitioner seeks review. Whether or not respondents ultimately collect damages as to the federal "walking time" claims, the Ninth Circuit has entered a legal judgment that petitioner failed to comply with these requirements of federal employment law. See generally *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) ("prevailing party" is a legal term of art defined as "'[a] party in whose favor a judgment is rendered, *regardless of the amount of damages awarded*'") (emphasis added) (quoting *Black's Law Dictionary* 1145 (7th ed. 1999)). That judgment will have res judicata and collateral estoppel effects on IBP regardless of whether respondents elect not to avail themselves of any damages awarded as part of that judgment, and will be the law of the Ninth Circuit, binding on all employers within its geographic scope across a range of industries.[3]

The Ninth Circuit's judgment on this issue of federal law, therefore, will have binding legal effects on petitioner. And the judgment conflicts with the rule that would be applicable in the First and Tenth (as well as Fifth) Circuits. Accordingly, this is very much a live controversy and any election respondents might subsequently make does not render the judgment unreviewable.

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[3] The rule that this Court does not review *state* court judgments that rest on "an independent and adequate state law ground," Opp. 10, is wholly inapplicable. That rule is based on principles of federalism, *see Coleman* v. *Thompson*, 501 U.S. 722, 726 (1991), which have no bearing where, as here, review is sought of a federal court's disposition of an issue of federal law.

2. Respondents do nothing to challenge petitioner's core showing that there is substantial confusion in the circuits on the important and far-reaching question of the degree of deference due less formal agency interpretations. As petitioner showed, and respondents do not dispute, numerous courts and commentators are openly seeking guidance about the degree of deference owed "less formal" agency interpretations such as the Opinion Letter at issue here. Pet. 19-25. Contrary to respondents' claims, this case is an appropriate vehicle for addressing this important issue.

Respondents' suggestion that the Ninth Circuit avoided this confusion by applying *Skidmore* "principles," Opp. 22, only confirms that the deference question petitioner raises is properly presented in this case. The fundamental question that has spawned widespread confusion in the lower courts is *whether* the appropriate standard of deference is that set forth in *Skidmore* where, as here, an agency has addressed statutory ambiguity through less formal means. Thus, arguing that the Ninth Circuit applied *Skidmore* deference begs the question; it does not obviate the need to resolve this fundamental issue of administrative law.

In fact, however, because the agency's 2002 Opinion Letter withdrew a 1997 Opinion Letter, the Ninth Circuit afforded the agency's current 2002 Opinion Letter no deference at all. Pet. App. 17a n.9. Had it properly applied *Skidmore*, the Ninth Circuit would have considered the change in agency position as but one of many factors bearing on the appropriate degree of deference due the 2002 Opinion Letter, and would have had to consider the carefully reasoned arguments the 2002 Opinion Letter gave for withdrawing the prior Opinion Letters. Conversely, under *Chevron*, because an agency may have a range of reasonable choices "not instantly carved in stone," but subject to reconsideration "on a continuing basis," under this more deferential standard of review, the 2002 Opinion Letter's interpretation of Section 3(*o*) would have prevailed. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984). Thus, the confusion about the proper standard to apply controlled the outcome below.

Nor is there any merit to respondents' contention that the degree of deference due the 2002 Opinion Letter was not raised or decided below. Opp. 19-20. As the Court has explained, review is appropriate where the court of appeals "decided the substantive issue presented." *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented."). Here, the degree of deference owed the 2002 Opinion Letter was briefed to the Ninth Circuit,[4] which decided the issue. Indeed, as respondents concede, the court below "considered the interpretations" of the statutory provision in the 2002 and 1997 Opinion Letters, cited an agency-deference case from this Court, and "rejected" the 2002 Opinion Letter, Opp. 21-22, determining that it was entitled to no deference because it was a "new, inconsistent interpretation," Pet App 17a n.9. In seeking rehearing, petitioner cited cases from the *Chevron* line and argued that the Ninth Circuit erred in failing to give "substantial deference" to the 2002 Opinion Letter. Opp. App. 42a-43a. The Ninth Circuit declined to correct this error. Pet. App. 84a. Accordingly, there can be no doubt that the degree of deference due the 2002 Opinion Letter was raised and addressed below. See *Richards* v. *Jefferson*

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[4] To give the misimpression that this issue was not raised below, respondents misleadingly focus on petitioner's June *3*, 2002 opening brief, Opp. 5-6, 20, which was filed three days *before* the June *6*, 2002 Opinion Letter was issued. In the briefing that followed issuance of the 2002 Opinion Letter, the parties addressed the interplay of the 2002 and 1997 Opinion Letters and the degree of deference owed to them, Opp. 20, with respondents arguing that the Opinion Letters were entitled to deference according to "their own persuasive force," Opp. App. 26a, and petitioner noting the "importance" of the 2002 Opinion Letter and arguing that the withdrawn 1997 Opinion Letter was entitled to no weight, *id.* at 37a.

County, Ala., 517 U.S. 793, 797 n.3 (1996) (issue raised on rehearing below "has been preserved for our review").[5]

Rather than confront the indisputable confusion in the circuits over the degree of deference due less formal agency interpretations, respondents focus on whether there is a circuit conflict over the proper interpretation of the underlying statutory term at issue here. But it is the widespread confusion—and the appeals for guidance—in the lower courts that warrant review of the second question presented. In all events, as petitioner pointed out, the Ninth Circuit's determination that certain attire worn in the meatpacking industry does not constitute "clothes" under Section 3(*o*) created a conflict with the Fifth Circuit's decision in *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (per curiam). Pet. 18. Although the Fifth Circuit was not faced with the identical protective gear at issue here, it rejected as "nonsensical" the claim that "sanitary garments . . . are not 'clothes' under § 203(*o*)." *Bejil*, 269 F.3d at 480 n.3. Its plain-meaning approach to the interpretation of the term "clothes" in Section 3(*o*) cannot be reconciled with the Ninth Circuit's interpretive approach, which ignored dictionary definitions and instead relied on interpretive principles applicable to statutory exemptions.[6]

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[5] Respondents note that petitioner did not cite all of the same cases below that it identified in its petition. Opp. 19-20. But even when a petitioner does not make the "exact argument below" that is pressed before this Court, review remains appropriate where, as here, the general issue was raised, especially "[g]iven the importance of the issue" presented. *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001). As petitioner has shown, Pet. 18-25, the proper standard for agency deference is indisputably "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law," *Virginia Bankshares, Inc.*, 501 U.S. at 1099 n.8 (internal quotations and citation omitted)—a showing respondents nowhere refute.

[6] Indeed, a number of courts have had no difficulty concluding that the gear worn by meatpacking employees are "clothes." *See, e.g., Saunders* v. *John Morrell & Co.*, No. C88-4143, 1991 WL 529542, at *1, *4 (N.D. Iowa Dec. 24, 1991) (Section 3(*o*) applies to exclude time spent by meatpacking employees in changing into and out of "steel-mesh gloves, synthetic-mesh gloves, goggles, helmets, arm guards, belly guards, knife and cut resistant gloves, knife guards, steel-toed shoes, rubber boots, rubber gloves, rubber aprons, and steel-mesh aprons"); *Nardone* v. *General Motors, Inc.*, 207 F. Supp. 336, 338, 340 (D.N.J. 1962) (time spent by metal finishers in changing into and out of "coveralls, gloves, aprons, goggles and hoods" excluded from compensation by Section 3(*o*)).

Finally, there is no merit to respondents' defense of the Ninth Circuit's construction of the statute. As petitioner has explained, the Ninth Circuit rejected out of hand the dictionary definition of "clothes" as overbroad, relying instead on its colloquial observation that the "admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit." Pet. App. 16a. In addition, the Ninth Circuit improperly treated the Section 3(*o*) exclusion as an exemption, relying heavily upon the general, but inapplicable, notion that exemptions are permitted only when there is a plain fit. *Id.* And, the "other regulations of the Secretary of Labor" to which respondents refer, Opp. 21, are the OSHA regulations addressed in the petition that, in fact, *include* protective gear as a *subset* of clothing. See 29 C.F.R. § 1910.1030(b). Accordingly, there was no justification for the Ninth Circuit's decision to exclude protective attire from the ambit of "clothes."

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS
HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

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* Counsel of Record

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No. 03-1238

In the Supreme Court of the United States

IBP, INC., PETITIONER

v.

GABRIEL ALVAREZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

THOMAS G. HUNGAR
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MICHAEL P. DOYLE
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a), excludes from compensation the time an employee must spend walking between the location at which he dons and doffs required protective gear and his work station, when such donning and doffing is an integral and indispensable part of the employee's principal work activities.

2. Whether the Court should reexamine its holding in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), that opinion letters issued by the Administrator of the Wage and Hour Division of the Department of Labor are not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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GABRIEL ALVAREZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay their employees a minimum wage and to compensate their employees for hours worked in excess of 40 in a given workweek at a rate of one and one-half times the employees' regular rate of pay. 29 U.S.C. 206, 207. Following enactment of the FLSA, the Court held that underground travel in mines to and from an employee's place of work is compensable work. *Jewell Ridge Coal Corp.* v. *Local 6167, United Mine Workers*, 325 U.S. 161 (1945); *Tennessee Coal*

Co. v. *Muscoda Local 123*, 321 U.S. 590 (1944). In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court held that walking from an employer's time clock to the employee's place of work and back is compensable work. *Anderson* also held that certain pre-shift activities, such as putting on garments and preparing equipment, is compensable work. *Id.* at 692-693.

Congress viewed *Anderson* as "creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). To address that "existing emergency," 29 U.S.C. 251(b), Congress enacted the Portal-to-Portal Act of 1947 (Portal-to-Portal Act), 29 U.S.C. 251 *et seq.* That Act extinguished employer liability for failure to pay minimum wage and overtime before May 14, 1947, for any activity unless it was compensable by contract or custom. 29 U.S.C. 252. For claims arising after that date, the Act provides that, absent contract or custom, no employer shall be liable for failure to pay minimum wage or overtime for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

In 1949, Congress added a provision that allows the compensability of time spent changing clothes at the beginning and end of a workday to be the subject of collective bargaining. That provision excludes from the hours worked "any

time spent in changing clothes * * * at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." Act of Oct. 26, 1949, ch. 736, § 3(*o*), 63 Stat. 911 (29 U.S.C. 203(*o*)).

In *Steiner* v. *Mitchell*, 350 U.S. 247, 252-253 (1956), the Court held that the phrase "principal activity or activities" as used in the Portal-to-Portal Act embraces all activities that are "an integral and indispensable part of the principal activities" an employee is hired to perform. The Court accordingly held that the pre- and post-shift activities of changing clothes and showering are compensable and not excluded by the Portal-to-Portal Act when they are "an integral and indispensable part of the principal activities for which covered worker[s] are employed." *Id.* at 256.

2. Petitioner IBP, Inc. operates a meat packing plant in Pasco, Washington. Pet. App. 2a-3a. Petitioner requires its employees to wear certain protective gear when performing their jobs. *Id.* at 4a n.2. All employees must wear hardhats, hair nets, ear plugs, gloves, and boots. *Ibid.* Employees who use knives must also wear metal aprons, leggings, vests, plexiglass arm guards, and protective sleeves. *Ibid.* Under petitioner's work rules, employees "must gather their assigned equipment, don that equipment in one of the [petitioner's] plant's four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors." *Id.* at 3a. After completing their shift on the floor, employees "must clean, restore, and replace their tools and equipment, storing all of it at the [petitioner's] plant itself." *Id.* at 3a-4a.

Respondents work in the slaughter and processing divisions of petitioner's Pasco plant. Pet. App. 6a. They filed suit against petitioner under the FLSA and state law, challenging petitioner's failure to pay them for the time spent

donning and doffing protective equipment and walking from the locker room to their work stations and back. *Ibid.*

After conducting a bench trial, the district court ruled in respondents' favor on most issues. Pet. App. 35a-82a. The court found that the donning and doffing of unique protective gear, such as mesh gloves, metal aprons, leggings, vests, plexiglass arm guards, and protective sleeves, is an "integral and indispensable" part of respondents' principal activities and is therefore compensable work under the FLSA. *Id.* at 53a-54a. The court further determined that the reasonable time spent walking from the locker room to the workstation and back is compensable. *Id.* at 54a. The district court rejected petitioner's contention that such walking time is non-compensable under the Portal-to-Portal Act. *Id.* at 53a-54a. The court reasoned that donning protective gear begins the workday and doffing that gear ends it, and that the Portal-to-Portal Act's exclusion applies only to walking time that occurs outside the workday. *Ibid.*

The district court also rejected petitioner's contention that the donning and doffing of protective gear is non-compensable as a result of collective bargaining pursuant to the FLSA's "changing clothes" exclusion. Pet. App. 64a-65a. The court reasoned that the items of safety gear at issue are not "clothes" within the meaning of that exclusion. *Id.* at 65a.

The district court determined, however, that the donning and doffing of "non-unique protective equipment"—hardhats, earplugs, frocks, safety goggles, hair nets, and boots—is not compensable under the FLSA because it is "not integral and indispensable to the job." Pet. App. 54a. Alternatively, the court concluded that the donning and doffing of non-unique gear is not compensable because the "time it takes to complete such work is de minimis as a matter of law." *Id.* at 54a & n.6.

The district court also ruled in respondents' favor with respect to certain of their state-law claims. Pet. App. 71a-77a. The court rejected, however, the largest monetary component of respondents' state law claims, namely, their assertion that state law entitled them to receive overtime compensation for the entirety of their 30-minute meal breaks whenever any portion of their meal breaks was spent working. *Id.* at 74a.

The district court entered a judgment awarding respondents damages of $3,098,517, comprised of $1,751,126 in FLSA overtime damages, $156,344 in state law overtime damages for a period preceding the FLSA limitations period, $286,119 in state law minimum wage damages, and $904,928 in state law rest break damages. Resp. Br. in Opp. App. 2a. The award of FLSA overtime damages reflected the court's determination that FLSA damages should be doubled pursuant to the Act's liquidated damages provision, 29 U.S.C. 216(b). Pet. App. 78a-79a.

In keeping with the court's rejection of respondents' state law meal break claim, the judgment did not award damages for that claim. Pet. App. 74a. Anticipating that its determination on that state law issue might be reversed on appeal, however, the district court announced that "[i]f the Court is reversed on appeal on its meal break ruling," respondents would then "be able to recover $7,297,517," comprised of $5,487,561 in state law overtime damages, $905,028 in state law minimum wage damages, and $904,928 in state law rest break damages. *Ibid.*

The court's initial judgment and its proposed alternative disposition both reflect the court's view that, when FLSA and state law claims are "duplicative," respondents should recover on only one of the claims. Pet. App. 80a. Under the court's calculations, total FLSA overtime damages initially exceeded state law overtime damages for the same period because FLSA damages were doubled but state law

overtime damages were not. Once full meal breaks damages were added, however, total state law overtime damages exceeded FLSA overtime damages. Based on that method of calculation, the court awarded overtime damages under the FLSA in its initial judgment but only under state law in its alternative disposition.

3. The court of appeals affirmed the district court's judgment as to the FLSA issues, but reversed that court's denial of respondents' state law meal break claims. Pet. App. 1a-34a. The court of appeals held that donning and doffing of unique sanitary and protective equipment is an "integral and indispensable" part of the respondents' principal activities and is therefore work that is compensable under the FLSA. *Id.* at 11a-12a.

The court of appeals also held that respondents are entitled to compensation for "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment." Pet. App. 18a. The court reasoned that respondents' work day begins when they don required safety gear and that "any activity occurring thereafter in the scope and course of employment" is not excluded by the Portal-to-Portal Act. *Id.* at 17a-18a. The court concluded that the walking time at issue is done in the scope and course of employment because respondents cannot perform their job without walking between the locker room and their work stations. *Id.* at 19a. The court added that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Ibid.*

The court of appeals further held that donning and doffing protective gear is not subject to the FLSA's "changing clothes" exclusion. Pet. App. 14a-17a. The court concluded that the FLSA's exclusions must be narrowly construed and

that the items of protective gear at issue are not "plainly and unmistakably" clothes. *Id.* at 15a-16a. The court noted that the Administrator of the Wage and Hour Division of DOL had issued a June 2002 opinion letter interpreting "clothes" to include protective safety equipment, but it rejected the Administrator's interpretation on the ground that it conflicted with previous interpretations by the Administrator. *Id.* at 17a n.9.

The court of appeals also affirmed the district court's conclusion that the donning and doffing of "non-unique" gear is not compensable. The court of appeals reasoned that the time required to don and doff non-unique gear is "*de minimis* as a matter of law." Pet. App. 12a-13a.

The court of appeals reversed the district court's denial of respondents' meal-break claims under state law. Pet. App. 30a-32a. Recognizing that the district court's ruling was "perhaps consistent with the FLSA," the court of appeals held that it was inconsistent with "mandatory language" in the state administrative code. *Id.* at 31a. Accordingly, the court of appeals "remand[ed] for recalculation of damages consistent with this full thirty-minute remuneration approach." *Id.* at 32a. Issuance of the mandate of the court of appeals has been stayed pending disposition of the petition for a writ of certiorari.

DISCUSSION

The first question raised in the petition is whether the Portal-to-Portal Act, 29 U.S.C. 254(a), excludes from compensation the time an employee must spend walking between the location at which he dons and doffs protective gear and his work station, when such donning and doffing is an integral and indispensable part of the employee's principal work activities. Because there is a conflict in the circuits on that issue, and the issue is one of recurring importance under the FLSA, this Court's review would be warranted in

an appropriate case. This case, however, may not be a suitable vehicle for resolving that issue. It appears likely that the Court's resolution of that issue would not affect the judgment that would ultimately be entered by the district court on remand in this case. That circumstance counsels against review of the walking time issue in this case.

Petitioner's second question asks whether an interpretation of the FLSA's "changing clothes" exclusion expressed in an opinion letter issued by the Administrator of the Wage and Hour Division of DOL is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Christensen* v. *Harris County*, 529 U.S. 576 (2000), the Court held that the Administrator's opinion letters are not entitled to *Chevron* deference, and petitioner has not made out the kind of compelling case necessary to justify overruling a decision of this Court. In any event, it appears likely that the Court's resolution of that issue, like the resolution of the first issue, would not affect the judgment that would be entered by the district court on remand.

A. 1. There is a conflict in the circuits on the question whether the Portal-to-Portal Act excludes from compensation walking time associated with the donning and doffing of safety gear, when such donning and doffing is an integral and indispensable part of the employee's principal work activities. The Ninth Circuit in this case correctly held that the Portal-to-Portal Act does not exclude walking time that occurs after an employee dons required safety gear. The court reasoned that the donning of safety gear commences an employee's work day, and that the Portal-to-Portal Act does not exclude from compensation walking time that occurs after the work day begins. Pet. App. 18a-19a. As the court explained, "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his

station, then recommenced when the walking is done." *Id.* at 19a.

The Ninth Circuit's holding and reasoning on this issue is inconsistent with the First Circuit's decision in *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274 (2004), petition for cert. pending, No. 04-66 (filed July 8, 2004). The First Circuit held in *Tum* that the Portal-to-Portal Act excludes from compensation walking time associated with the donning and doffing of required safety gear. *Id.* at 279-281. That court reasoned that while donning of required safety gear is an integral and indispensable part of an employee's primary activities and is therefore itself compensable (*id.* at 279), it does not start the workday for purposes of the walking time exclusion in the Portal-to-Portal Act. *Id.* at 280-281.

The two cases are capable of being reconciled on their facts. The Ninth Circuit unambiguously held that walking time is compensable when it follows donning of protective gear that consumes an amount of time that is not de minimis. Pet. App. 18a-19a. The court did not clearly resolve the question whether walking time would also be compensable when it follows donning that, taken alone, consumes a de minimis amount of time. See *id.* at 13a (finding time spent on donning non-unique gear to be "de minimis" and therefore "not compensable"); compare *id.* at 18a (district court properly required compensation for walking time following "compensable" donning and doffing), with *id.* at 14a ("'donning and doffing' and 'waiting and walking' constitute compensable work activities except for the *de minimis* time associated with the donning and doffing of non-unique protective gear"). Because all of the walking at issue in *Tum* followed donning that consumed what the jury found to be a de minimis amount of time, 360 F.3d at 278, it is unclear whether that time would have been compensable under the Ninth Circuit's interpretation of the FLSA.

The First Circuit, however, did not base its walking time ruling on the jury's finding in that case that the donning and doffing at issue consumed a de minimis amount of time. Although the rationale for its decision is less than clear, the First Circuit's opinion appears to hold as a categorical matter that walking time associated with donning and doffing is simply not compensable. 360 F.3d at 280-281 (citing, inter alia, *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994)); but cf. *id.* at 285-286 (Boudin, C. J., concurring) (raising question whether de minimis donning and doffing can "be disregarded as starting the workday," and stating that "[i]t may be time for the Supreme Court to have another look at the problem"). That holding is directly inconsistent with the holding of the Ninth Circuit in this case. Indeed, the court below and the First Circuit in *Tum* specifically acknowledged their disagreement on the compensability of walking time that is associated with the donning and doffing of safety gear. Pet. App. 19a n.10; *Tum*, 360 F.3d at 281.

In *Reich* v. *IBP, Inc.*, *supra*, the Tenth Circuit also addressed the compensability of walking time that occurs after the donning of protective gear. In that case, the court of appeals held that donning and doffing of protective gear is an integral and indispensable part of a knife-worker's primary activities and is therefore compensable. 38 F.3d at 1125-1126. Because employees exercised discretion on when they picked up their protective gear and on when and where they put it on, however, the district court in that case had been unable to conclude that donning and doffing "were the first and last principal activities of the workday which would commence and toll the running of the timeclock, including 'wait and walk time.'" *Id.* at 1127. Instead, the district court held (and the court of appeals agreed) that the employees were entitled to be compensated for donning protective gear, but not for associated walking time occurring before or after

the compensable workday. *Ibid.*[1] Because the *Reich* decision relied on the personal discretion enjoyed by the employees in that case, it is factually distinguishable from the decision below. Nonetheless, the Tenth Circuit's refusal to require compensation for a portion of the walking time at issue in that case is at least arguably in some tension with the decision below, and enhances the need for resolution of the question presented in the petition.

2. The question whether walking time associated with the donning and doffing of protective gear is compensable has considerable importance to the employers and employees involved in the chicken and beef industries. See Br. of National Chicken Council, et al. as Amicus Curiae (i)-(ii). Because of that issue's importance to the administration of the FLSA, the Secretary of Labor has devoted considerable attention to it. The Secretary filed suit seeking compensation for such walking time in *Reich* v. *IBP, Inc.*, *supra*. The Secretary filed amicus briefs in the courts below in both this case and *Tum*, expressing the Secretary's view that such time is compensable. And the Secretary is currently engaged in two district court proceedings outside the First and Ninth Circuits in which the Secretary is seeking compensation for walking time associated with the donning and doffing of safety gear. *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174

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[1] By contrast, the district court in *Reich* held that walking time associated with pre-shift or post-shift activities was compensable when those activities started the workday. In particular, the court found that the workday commenced when employees picked up their knives at the knife room, and ceased when they dropped off their knives at the knife room after their shift, because "knives were an integral and indispensable part of the production work of knife carrying employees." *Reich* v. *IBP, Inc.*, 820 F. Supp. 1315, 1325 (D. Kan. 1993). Accordingly, the court held that "the time spent walking from the knife room to the work station and back to the knife room was compensable because it occurred during the workday." *Ibid.* That conclusion was not disturbed on appeal.

(N.D. Ala. filed May 9, 2002); *Chao* v. *George's Processing, Inc.*, No. 6:02-CV-03479-RED (W.D. Mo. filed Nov. 20, 2002). Because the circuits have divided on that issue and because the issue is one of ongoing public importance, it warrants the Court's review.

3. This case may not be an appropriate vehicle to resolve that issue, however, because it appears that the Court's resolution of that issue would not affect the judgment to be entered by the district court. The reason is as follows: Respondents filed suit under both the FLSA and state law. The district court found both federal law and state law violations and entered a judgment awarding respondents $3,098,517, more than half of which constituted damages under the FLSA with the remainder being based on respondents' state law claims. Resp. Br. in Opp. App. 2a; see p. 5, *supra*. The district court did not rule in respondents' favor on their state law claim seeking compensation for petitioner's failure to provide them with a 30-minute meal break, and accordingly the court did not award damages on that claim. Anticipating that its determination on that state law issue might be reversed on appeal, however, the district court announced that if respondents prevailed on that issue on appeal, it would instead award respondents a total of $7,297,517, comprised entirely of damages under state law. Pet. App. 74a. The court of appeals did reverse the district court on the state law meal break issue. *Id.* at 30a-32a. It thus appears that, once this case is returned to the district court, that court will enter a monetary judgment of $7,297,517 that is based entirely on state law. *Id.* at 74a. See pp. 5-6, *supra* (explaining why initial judgment awarded overtime damages under the FLSA for overlapping state and federal law periods, but alternative disposition rests overtime award only on state law).

This Court's resolution of the walking time issue would have no apparent effect on the district court's authority to

enter such a judgment. In its petition, petitioner challenges the lower court's authority to award walking time based on federal law; it does not challenge the lower court's authority to award walking time based on state law. Nor would a determination that walking time is excluded under federal law carry over to state law, because the applicable state statute does not contain any walking time exclusion that parallels the Portal-to-Portal Act. Pet. App. 71a; Wash. Rev. Code Ann. §§ 49.46.005 *et seq.* (West 2002 & Supp. 2004). Petitioner argued in its reply brief in the court of appeals that the Portal-to-Portal Act preempts state law to the extent that it authorizes compensation for walking time that would not be compensable under federal law (C.A. Reply Br. 37-41). But the court of appeals held that petitioner waived that argument by not presenting it in a timely manner, Pet. App. 15a, and petitioner has not sought review of that determination.

Because the court of appeals vacated the district court's judgment, on remand respondents could theoretically seek entry of a judgment different than the proposed alternative disposition suggested by the district court in its opinion. For example, respondents could seek entry of a judgment awarding the same amount of damages, but urge that it be based expressly on both federal law and state law, thereby maximizing their chances of receiving the collateral estoppel benefits of the federal law rulings in their favor. Respondents could also seek a judgment that awards pre- and post-shift overtime damages based on the FLSA, together with meal break overtime damages based on state law. Under the district court's prior rulings, that method of calculating damages would lead to an increase in the total amount of damages awarded to respondents, because the district court (as affirmed by the court of appeals) has already held that respondents' FLSA damages are to be doubled pursuant to the Act's liquidated damages provision, but does not appear to

have doubled preliminary and postliminary donning, doffing, and walking time damages under state law. Pet. App. 78a-80a. Respondents have represented to us, however, that they will seek entry of the alternative judgment proposed by the district court and nothing more. It therefore appears likely that the Court's resolution of the walking time issue would not affect the judgment that will be issued on remand.

That circumstance does not demonstrate that a ruling by this Court on the walking time issue would be advisory and therefore outside the scope of the Court's Article III jurisdiction. A ruling by the Court that the FLSA does not require compensation for walking time associated with donning and doffing safety gear would authoritatively foreclose the district court from awarding or increasing walking time damages based on federal law, and it would eliminate any possibility that the district court's and the court of appeals' federal walking time rulings would have collateral estoppel effects on petitioner in other cases. Such a ruling would also eliminate any possibility that the FLSA violation found in this case could serve as a basis for DOL to impose a civil penalty in the event that petitioner violates the FLSA in the future. See 29 C.F.R. 578.3(b) (authorizing the Secretary to impose civil penalties upon "repeat" violators). Cf. *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) (a criminal defendant's completion of sentence does not moot case because of possible collateral consequences, such as an enhanced sentence for a later conviction). Those consequences are sufficient to prevent the Court's ruling from being advisory in an Article III sense.

Nonetheless, because it appears that the district court is likely to enter the same judgment regardless of how this Court rules on the walking time issue, prudential considerations may counsel against granting review on that issue in this case. This Court ordinarily does not grant review in cases unless a reversal would change the relative rights of

the parties in some concrete fashion. In *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), for example, the Court granted certiorari to decide whether a contract provision that barred an in personam action was enforceable. After it became clear that "in any event the [plaintiff] will be able to try its claim in the District Court" because the contract did not bar the plaintiff's parallel in rem action, the Court dismissed the writ of certiorari as improvidently granted. *Id.* at 183. The Court explained that it decides issues of public importance only in the context of "meaningful litigation," and that a resolution of the question on which the Court had granted review could "await a day when the issue is posed less abstractly." *Ibid.* The Court has also denied review in other comparable circumstances. *South Dakota* v. *Kansas City S. Indus., Inc.*, 880 F.2d 40 (8th Cir. 1989), cert. denied, 493 U.S. 1023 (1990) (certiorari denied on federal law conflict where state law furnished an independent ground for affirming court of appeals); *Sommerville* v. *United States*, 376 U.S. 909 (1964) (certiorari denied on conflict over whether state or federal law applied when petitioner would be liable under either); see Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) (discussing cases). Petitioner has not identified any case in which the Court has granted review in circumstances like those presented here, and we are not aware of any such case. Thus, while the walking time issue warrants review in an appropriate case, the Court may prefer to await a case in which the issue "is posed less abstractly."[2]

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[2] A petition for a writ of certiorari is pending in *Tum* v. *Barber Foods, Inc.*, No. 04-66 (filed July 8, 2004), and also raises the walking time issue, albeit in a somewhat different factual context in view of the jury's conclusion that the associated donning and doffing time was de minimis. That petition also raises another question of considerable significance to the administration of the FLSA—whether donning and doffing time should be considered together with walking time in assessing whether the

2. The second question raised in the petition is whether an opinion letter issued by the Administrator of the Wage and Hour Division of DOL is entitled to *Chevron* deference. In *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), the Court held that the Administrator's opinion letters are not entitled to *Chevron* deference, but instead are entitled to weight under the factors set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). According to petitioner (Pet. 19-20), however, the Court's decision in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), calls into question the holding in *Christensen*, and this Court's review is necessary to resolve the resulting "confusion."

That issue does not merit review. *Mead* held that classification rulings issued by Customs officials are not entitled to *Chevron* deference, a holding that is consistent with the result reached in *Christensen*. In its analysis of the deference issue, *Mead* made clear that opinion letters are not categorically barred from receiving *Chevron* deference. Instead, *Mead* instructs that, in deciding whether opinion letters are entitled to *Chevron* deference, a court should decide whether an agency's "generally conferred authority and other statutory circumstances" make it "apparent" that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." 533 U.S. at 229. *Mead* did not indicate, however, that opinion letters issued by the Administrator are entitled to *Chevron* deference under that standard. Indeed, *Mead* cited *Christensen* with apparent approval. See *id.* at 236 n.17, 237-238.

Petitioner argues (Pet. 22-23) that the Administrator's opinion letter in this case is entitled to *Chevron* deference under the *Mead* standard, because the Administrator is appointed with the advice and consent of the Senate and has certain administrative responsibilities, 29 U.S.C. 204(a), and because employers that rely in good faith on the Administrator's opinion letters are entitled to a defense against FLSA liability. 29 U.S.C. 259(a). But reliance on those two factors would lead to the conclusion that all opinion letters issued by the Administrator are entitled to *Chevron* deference—a position that is at odds with *Christensen* and that would therefore require its overruling. See *Skidmore*, 323 U.S. at 140 (holding that Administrator's interpretations of the FLSA "are not controlling upon the courts by reason of their authority" but "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). Petitioner has not made out the kind of compelling case that would be necessary to justify the overruling of this Court's precedents.

In *Barnhart* v. *Walton*, 535 U.S. 212 (2002), the Court held that a particular Social Security Administration interpretation was entitled to *Chevron* deference because of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222. That decision suggests a basis for arguing that some opinion letters issued by the Administrator might warrant *Chevron* deference in appropriate circumstances—a position that would require qualifying *Christensen* and *Skidmore*, but not overruling them. *Barnhart*, however, does not support petitioner's

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time devoted to those activities is de minimis, or whether donning and doffing time should instead be examined in isolation. The respondent in *Tum* has not filed a brief in opposition, but to the extent we have been able to determine based on a review of the opinion in that case, it appears that *Tum* would likely provide the Court an opportunity to resolve the existing disagreement among the circuits over the walking time issue. Because the cases raise closely related issues, the Court may wish to hold the petition in this case pending its disposition of the petition for a writ of certiorari in *Tum*.

view that all opinion letters issued by the Administrator are categorically entitled to *Chevron* deference.

Nor is this case an appropriate one in which to decide whether there are some opinion letters issued by the Administrator that would warrant *Chevron* deference under *Barnhart*. First, petitioner did not ask the court of appeals to give the Administrator's interpretation *Chevron* deference in light of the factors set forth in *Barnhart*. Accordingly, the court of appeals did not purport to resolve the deference issue in terms of the *Barnhart* factors. Pet. App. 17a n.9.

Second, the question whether particular opinion letters issued by the Administrator might be entitled to deference under *Barnhart* would benefit from further ventilation in the courts of appeals. Petitioner has cited only two recent court of appeals decisions in which opinion letters issued by the Administrator have been at issue. Both courts concluded that they would reach the same conclusion regardless of the level of deference accorded to the opinion letters. Accordingly, neither court decided the precise level of deference required. See *Houston Police Officers' Union* v. *City of Houston*, 330 F.3d 298, 304-305 (5th Cir.), cert. denied, 124 S. Ct. 300 (2003); *Herman* v. *Fabri-Centers of Am., Inc.*, 308 F.3d 580, 592-593 (6th Cir. 2002), cert. denied, 537 U.S. 1245 (2003).

Petitioner also contends (Pet. 26) that, regardless of the proper degree of deference due, "the Ninth Circuit below erred by rejecting out of hand the agency's 'new' interpretation." We agree that the court of appeals was wrong to dismiss the Administrator's comprehensive and carefully reasoned opinion letter setting forth the rationale for the agency's interpretation of the "changing clothes" exception. Pet. App. 94a-100a. The court of appeals misapplied *Skidmore*, failing even to acknowledge the "thoroughness evident in [the opinion letter's] consideration," the "validity of its

reasoning," and "its consistency with earlier * * * pronouncements." 323 U.S. at 140; see Pet. App. 17a n.9. The court instead concluded that a temporary change in position, standing alone, sufficed to justify its refusal to defer. Consistency of interpretation is only one of the factors to be considered under *Skidmore*, however, and in any event the Administrator in this instance was merely readopting the agency's previous enforcement practice. *Id.* at 94a-95a. Notwithstanding the Ninth Circuit's error, however, the court's mere misapplication of *Skidmore* does not create a circuit conflict or otherwise rise to the level of an issue requiring this Court's attention.

Petitioner briefly argues (Pet. 18) that review is also warranted on the "changing clothes" issue because the decision below "creates a conflict" with the Fifth Circuit's decision in *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477 (2001) (per curiam). There is, however, no conflict. In *Bejil*, the Fifth Circuit held that sanitary garments, such as lab coats, dedicated shoes and shoe coverings, and hair and beard coverings fall within the "changing clothes" exclusion. *Id.* at 480 n.3. The court of appeals in this case, however, did not address items of that kind. Instead, it held that special protective gear such as metal aprons and Kevlar gloves do not constitute "clothes." The court reasoned that the "changing clothes" exclusion applies only to items that are "plainly and unmistakably" clothes, and that the items of special protective gear at issue here are not "plainly and unmistakably" clothes. Pet. App. 16a-17a. That analysis does not suggest that the Ninth Circuit would reach the same conclusion about the items at issue in *Bejil*.

Finally, review is unwarranted on the "changing clothes" issue for the same reason that it may be unwarranted on the walking time question. Because there is no state law "changing clothes" exclusion, it appears that resolution of

that issue would not affect the judgment that will be issued by the district court.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Tum*, No. 04-66. If the petition in *Tum* is granted, the Court may wish to hold the petition in this case pending its decision on the merits in *Tum*. If the petition in *Tum* is denied, the petition in this case should also be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
THOMAS G. HUNGAR
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General

HOWARD M. RADZELY
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
MICHAEL P. DOYLE
Attorney
Department of Labor

OCTOBER 2004

(5)

No. 03-1238

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IBP, Inc.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

WILLIAM RUTZICK*
KATHRYN GOATER
SCHROETER GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

DAVID MARK
LAW OFFICE OF DAVID MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Counsel for Respondents

* Counsel of Record

November 10, 2004

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SUPPLEMENTAL BRIEF

Respondents Alvarez, Gutierrez, Hernandez, Martinez, Moreno, and Rodriquez file this supplemental brief in response to the Petitioner's supplemental brief and the United States' *amicus* brief.

While the petition should be denied because there is not an intolerable conflict among the circuits,[1] this supplemental brief addresses (1) why review will not affect the judgment below, and (2) why, if the petition is held or granted, the stay of the mandate should be lifted so that the 815 workers can recover their state law damages that the parties and the United States agree are not affected by the petition.

REVIEW WILL NOT AFFECT THE JUDGMENT BELOW

The United States recommends against granting the petition based on Respondents' "represent[ation] to us that they will seek entry of the alternative judgment proposed by the district court and nothing more." U.S.14. IBP responds that Respondents' representation is "extraordinary," not supported by representations made to the Court of Appeals or to this Court and fundamentally inconsistent with "duties the class counsel and named plaintiffs owe to other class members." IBP Supp. Brief 4. IBP is wrong on all counts.

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[1] The United States concludes the Ninth and First Circuit cases "are capable of being reconciled on their facts." U.S. 9. IBP's supplemental brief does not dispute that conclusion. While IBP's parent (Tyson Foods) is interested in this general legal issue, the present case is not an appropriate vehicle. *See also* discussion *infra*.

Respondents told the Court of Appeals regarding the state law meal break cross-appeal that the trial court "should be reversed and judgment entered using the alternate damage finding." Resp. Supp. App. 1b.[2] Respondents told this Court that "[r]egardless of any ruling in this Court on the issues raised by IBP, the plaintiffs herein will recover all of their damages *under state law*" and "[p]laintiffs will receive a judgment based entirely on state law whether the Ninth Circuit is affirmed or reversed on the issues raised in this petition." Resp. Brief 9-10 (italics in original). Respondents go even further now by attaching hereto a copy of the state law judgment that they will seek to have entered in the district court if petition for *certiorari* is denied or the stay of mandate is lifted. Resp. Supp. App. 3a-4a. The proposed judgment is taken directly from the alternative finding of fact. (Pet. App. 74a).

Attorneys are not required to advance every possible theory for recovery, particularly where it is undesirable from a litigation strategy standpoint.[3] In the present case, the trial court's findings support a $7.3 million judgment that leaves IBP with no viable issues to

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[2] IBP argues that Respondents "vigorously litigated the walking time issue below." IBP Supp. Brief 4. However, Respondents did so only because they could not know in advance how the Ninth Circuit would rule on their state law meal break cross-appeal.

[3] In the trial court, Respondents decided there were enough disputed legal theories and damages variables without trying to convince the trial court to split each workday into FLSA minutes and MWA minutes. Instead, plaintiffs sought – and obtained – the greater of FLSA or MWA overtime on a week-by-week basis. *See* Resp.App. 2a. Furthermore, it is too late to tell the trial court that it erred by accepting Respondents' $7.3 million state law damage figures and that new damages hearings are necessary.

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> appeal. The alternative is (a) to attempt to reopen the case for a novel damages theory not previously argued to the trial court, (b) to reprogram the damages database to count part of the workday as FLSA overtime minutes and the

other part as state overtime minutes, (c) to reopen discovery and require an evidentiary hearing, and (d) to present IBP with issues for further appeals. Even if Respondents were successful at each of the above steps, class member damages would only marginally increase.[4] IBP's analysis of the class members' best interests is flawed.

The United States has told this Court that it is "unaware of any such case" where review has been granted which will not change the relative rights of the parties in some concrete fashion. U.S. 15. Petitioner's supplemental brief offers no such cases.

IF THE PETITION IS HELD OR GRANTED, THE STAY OF THE MANDATE SHOULD BE LIFTED.

Supreme Court Rule 16 allows the Court to enter "an appropriate order" on *certiorari* petitions. Vacating a stay of mandate does not destroy this Court's power to review the lower court's judgment. *United States v. Villamonte-Marquez,* 462 U.S. 579, 581 n. 2 (1983); *Aetna Casualty Co. v. Flowers,* 330 U.S. 464, 467 (1947). In *Meredith v. Fair,* 83 S.Ct. 10, 9 L.Ed.2d 43 (1962), Justice Black vacated stays of mandate, stating:

> [T]he stays issued in this case can only work further delay and injury to movants while

[4] The overwhelming majority of the original FLSA $1.75 million overtime judgment (Resp.App.2a) is covered by the $7.3 million state law judgment, specifically overtime for meal breaks, pre-shift and post-shift work, plus double damages for meal breaks. Pet.App. 74a.

> immediate enforcement of the judgment can do no appreciable harm to the University or the other respondents. ...

The same is true herein. Respondents, the United States and the Petitioner agree that the 815 slaughterhouse workers have a right to recover $7.3 million under state law for work performed between June 1995 and May 2000.

This case has been in litigation for almost 6½ years. Public policy recognizes the "urgent nature" of the right to recover statutory minimum wages and overtime pay. *Levya v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979). No legitimate purpose is served by continuing the stay of the mandate even if the petition is held or granted, because this Court retains the power to review the lower court's ruling.

CONCLUSION

The petition for a writ of *certiorari* should be denied or, if held or granted, this Court's order should lift the stay of mandate.

Respectfully submitted,

William Rutzick*
Kathryn Goater
SCHROETER, GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

David Mark
LAW OFFICE OF DAVID MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Counsel for Respondents

* Counsel of Record

November 10, 2004

APPENDIX A

CA Nos. 02-35042 & 02-35110

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL ALVAREZ, RANULFO GUTIERREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, ISMAEL RODRIQUEZ, VIRGINIA ALVAREZ and MARIA CHAVEZ, individually and as class representatives,

Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC., a Delaware corporation,

Defendant/Appellant/Cross-Appellee.

Cross-Appeal from the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
(District Court No. CT-98-5005-RHW)

PLAINTIFFS/APPELLEES/CROSS-APPELLANTS' BRIEF

William Rutzick
Kathryn Goater
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, #500
Seattle, Washington 98104
Telephone: 206/622-8000
Attorneys for Plaintiffs/Appellees/ Cross-Appellants

David Mark
LAW OFFICES OF DAVID MARK
810 Third Avenue, #500
Seattle, Washington 98104
Telephone: 206/340-1840
Attorneys for Plaintiffs/Appellees/ Cross-Appellants

***

meal break. Weeks; accord, WAC 296-126-092(1); DLI Interpretative Guideline ES-026. (Exhibit 194, SER 279-281)

Plaintiffs agree with the District Court's meal break findings, including: "IBP never attempted to provide the employees with a 30-minute meal break," and employees were "not completely relieved from duty during their meal break." (Findings 25 & 42, ER 143 & 160)

Plaintiffs disagree with the Court's conclusion that breaks that are too short to qualify as a "meal break" or that are interrupted by work may still be partially uncompensated. (Findings 36-37, ER 154-155) The Court's conclusion was based on a misreading of DLI's guideline. (Exhibit 194, SER 279-281) This state law interpretation is subject to de novo review. Salve Regina College v. Russell, 499 U.S. 225, 231 (1991).

The Court should be reversed and judgment entered using the alternative damage findings. (Findings 37, ER 155) Under Washington law, a meal break may be unpaid only if the employee is given least 30 minutes during which he or she is completely relieved from duty.

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***

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GABRIEL ALVAREZ, et. al., Plaintiffs, v. IBP, INC., Defendant.	NO. CT-98-5005-RHW [proposed] JUDGMENT

This action having been tried before the Court, the Honorable Robert H. Whaley, United States District Judge, presiding, and having been remanded from appeal thereof;

IT IS ORDERED AND ADJUDGED:

That the Plaintiffs Gabriel Alvarez, *et al,* recover of the Defendant, IBP, Inc., the sum of $ 7,297,517, plus interest at 3.43% from September 14, 2000 to date of entry of this judgment, for damages calculated through May 14, 2000 and comprised of $ 5,487,561 in MWA overtime damages, $ 905,028 minimum wage damages, and $ 904,928 in rest break damages under Washington law;

That Plaintiffs Gabriel Alvarez, *et al,* recover of the Defendant IBP their costs of action and reasonable attorney fees and costs through December 14, 2001, as previously determined by this Court's order of December 14, 2001, in the amount of $ 1,974,394 plus interest at 2.21% from December 14, 2001 to date of entry of this judgment;

That Plaintiffs Gabriel Alvarez, et al. are directed to file a motion to establish recoverable attorney fees and costs for post- December 14, 2001 matters on a date to be determined by this Court after consultation with the parties;

That post-judgment interest accrue on all above-stated items at the rate provided by 29 U.S.C.§ 1961, ___%;

Since the damages awarded above resolve all matters having to do with plaintiffs' state law claims and that plaintiffs have represented that they will not be seeking any additional monetary damages herein regardless of the result of the resolution of the federal law claims and that final judgment will be entered when appellate proceedings are terminated, it is hereby ordered that there is no just reason for delay of entry of judgment pursuant to Fed.R.Civ.P. 54(b); and

The District Court Executive is directed to enter judgment forthwith and to provide copies to counsel.

Dated this ____ day of _____, _____

_____
ROBERT H. WHALEY
United States District Judge

(7)

Supreme Court, U.S.
FILED
NOV 2 - 2004
OFFICE OF THE CLERK

No. 03-1238

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

November 2, 2004

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SUPPLEMENTAL BRIEF

Petitioner IBP, inc. ("IBP") submits this supplemental brief in response to the brief for the United States.

I. THE UNITED STATES HAS CONFIRMED THAT REVIEW OF THE "WALKING TIME" ISSUE IS WARRANTED.

The United States acknowledges that there is an irreconcilable conflict among the courts of appeals as to the "walking time" issue raised in the first question presented, and that this issue affects the entire meat-processing industry, is important to the administration of the Fair Labor Standards Act ("FLSA"), and "warrants the Court's review." U.S. 11-12. The United States likewise confirms that this Court's resolution of this issue will have sufficiently concrete consequences for the parties "to prevent the Court's ruling from being advisory in an Article III sense." *Id.* at 14. The United States stops short of urging the Court to grant the petition, however, based on concerns that those consequences are not concrete enough to render this case "an appropriate vehicle to resolve" the important issue presented. *Id.* at 12. These prudential concerns, which arise from a curious, non-binding "representation" by respondents' counsel to the government, *id.* at 14, are misplaced. In fact, both parties have significant incentives to litigate this case in a manner that ensures a full adversarial presentation of a significant and unsettled issue of federal law.

1. The United States endorses each of the petition's three core arguments justifying review of the "walking time" issue. First, the United States agrees that "there is a conflict in the circuits." *Id.* at 7; *id.* at 12 ("Because the circuits have divided on [the walking time] issue . . . it warrants the Court's review."). Specifically, the United States agrees that the holding of the First Circuit's decision in *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 281 (1st Cir. 2004), *petition for certiorari filed* No. 04-66 (U.S. July 8, 2004), *cross-petition*

for certiorari filed, No. 04-231 (U.S. Aug. 16 2004), "is directly inconsistent with the holding of the Ninth Circuit in this case" and, moreover, that "the court below and the First Circuit in *Tum* specifically acknowledged their disagreement" on the walking time issue. U.S. 10. The United States also recognizes that the Tenth Circuit's decision in *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), is in "tension with the decision below, and enhances the need for resolution of the question presented." U.S. 11. The United States advises that this conflict is ripe for review. *Id.* at 7-8.

Second, the United States agrees that the walking time issue "is one of ongoing public importance [that] warrants the Court's review." *Id.* at 12; *id.* at 7 (noting its "recurring importance"). For example, "[b]ecause of that issue's importance to the administration of the FLSA, the Secretary of Labor has devoted considerable attention to it." *Id.* at 11. Indeed, the Secretary is involved in significant ongoing litigation involving this issue nationwide, including other litigation against petitioner's parent company (discussed below). *Id.* at 11-12. Moreover, the United States acknowledges that the issue "has considerable importance to the employers and employees involved in the chicken and beef industries." *Id.* at 11. This acknowledgement also weighs heavily in favor of review. See Robert L. Stern et al., *Supreme Court Practice* 243 (8th ed. 2002) ("The importance of the issues involved in the case as to which review is sought is of *major significance* in determining whether the writ of certiorari will issue.") (emphasis added).

Third, the United States agrees that there is no jurisdictional impediment to accepting review. Namely, this case is within "the scope of the Court's Article III jurisdiction" and a decision from this Court would not be merely "advisory in an Article III sense" in the circumstances presented. U.S. 14.[1]

---

[1] Although the United States repeatedly refers to this Court's review potentially having no impact on the district court's "judgment," *e.g.*, U.S. 8, it plainly is using this term to suggest that the Court's review might not change respondents' money damages, not to suggest that review would have no bearing on the Ninth Circuit's decision that petitioner violated federal law or the precedential value of the decision below in the Ninth Circuit, *see id.* at 14.

2. Nonetheless, the United States speculates that, on an eventual remand, the district court *might* enter an alternative judgment in which damages are derived solely from respondents' state law claims and that, for this reason, "prudential considerations *may* counsel against granting review" on the walking time issue. U.S. at 14 (emphasis added). These prudential concerns are misplaced.

Although the district court did announce an alternative damages calculation comprised entirely of damages under state law, Pet. App. 74a, the court of appeals did not remand for entry of this alternative amount; it remanded "for recalculation of damages," *Id.* at 34a. Indeed, the United States acknowledges that respondents have two compelling reasons for seeking entry of a judgment that is predicated, in part, on their federal "walking time" claims. First, respondents could "seek entry of a judgment awarding the same amount of damages, but urge that it be based expressly on both federal and state law, thereby maximizing their chances of receiving the collateral estoppel benefits of the federal law rulings." U.S. 13. Second, respondents could seek entry of a judgment that would award them "pre- and post-shift overtime damages based on the FLSA, together with meal break overtime damages based on state law"—an award that would "lead to an *increase* in the total damages" they receive because their federal law damage award, but not their state law damage award, provides double damages. *Id.* (emphasis added).

Nevertheless, the United States suggests that entry of such highly favorable (to respondents) damages awards is not "likely" because "[r]espondents have represented to us" that upon remand "they will seek entry of the alternative [money]

judgment proposed by the district court and nothing more." *Id.* at 14. Thus, the United States suggests that it is "likely that the Court's resolution of the walking time issue would not affect the [money] judgment that will be issued on remand." *Id.*; *id.* at 12.

Respondents' extraordinary, off-the-record suggestion of what they might do on remand is insufficient to immunize this case from review. Respondents made no such representation to the court of appeals; instead, they vigorously litigated the "walking time" issue below and obtained a federal law decision that plainly warrants this Court's review. Moreover respondents' counsel have made no such representation to this Court, and petitioner has no guarantee that any or all respondents would feel themselves bound to this unsworn remark after remand. More fundamentally, this representation is inconsistent with the interests of some respondents, and the duties class counsel and named plaintiffs owe to other class members. See generally Fed. R. Civ. P. 23(e)(1)(A) ("The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class."); *id.* 23(a) (class representatives must "fairly and adequately protect the interests of the class"); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 321 (3d Cir. 2001) ("the aggregate nature of the class action in no way implies that the court's fiduciary duties to the whole class are somehow greater or more important than its duties to the individual members of the class").

Accordingly, it is far from clear that respondents' counsel and the named plaintiffs are even authorized to seek less than all to which a given class member might be entitled, or why they would even seek to do so. Nor is it clear that they are free to relinquish possible collateral estoppel arguments on behalf of each member of the class, particularly when follow-on litigation involves virtually the same parties and same walking time issue. Indeed, in *Chavez* v. *IBP, inc.*, No. CT-01-5093-RHW (E.D. Wash. filed Nov. 5, 2001), a case that

the United States does not discuss, a class of employees from the same plant is pursuing the same walking time claim in the context of the same or similar clothes-changing activities. The same counsel represent respondents and the plaintiff class in the *Chavez* follow-on litigation, and two of the named class representatives in this case are also named class representatives in *Chavez*. In addition, of the 815 class members in this case, 646 are participating in *Chavez*, and 400 of these are asserting FLSA claims as to which they seek damages commencing the day after the damages period in this case. For this reason, the *Chavez* plaintiffs (and their counsel) have powerful reasons to seek to ensure that any judgment entered in this case bears collateral estoppel effect on the walking time claims asserted in *Chavez*.

Thus, it is not at all "likely" that the district court will enter the same judgment "regardless of how this Court rules on the walking time issue." U.S. 14. Respondents have strong financial incentives, and even ethical obligations, to seek entry of an FLSA-based judgment that enhances their damages recovery in this case and maximizes their chances of success in follow-on litigation. Those same incentives ensure that they will be zealous advocates before this Court on the walking time issue.

3. Even if respondents did not have powerful incentives to seek entry of a damages award based on federal law, the judgment below has practical significance to IBP that eliminates any "prudential" reasons for declining to review the important federal issue posed in this case. The United States acknowledges that a favorable ruling on the merits by this Court "would eliminate any possibility that the district court's and the court of appeals' federal walking time rulings would have collateral estoppel effects on petitioner in other cases." U.S. 14; see generally *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984). It likewise acknowledges that "[s]uch a ruling would also eliminate any possibility that the FLSA violation found in this case could serve as a basis for DOL to

impose a civil penalty in the event that petitioner violates the FLSA in the future." U.S. 14.

Both of these consequences are enormously important to IBP. IBP and its corporate parent, Tyson Foods, Inc. (which acquired IBP in September 2001) are defendants in more of these cases than any other food processor in the country. One such case, cited by the United States, is *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala. filed May 9, 2002), in which the Secretary of Labor seeks damages for employees at one plant and nationwide injunctive relief. In that case, Tyson Foods reached agreement with the Secretary to stay the litigation pending this Court's determination of this petition because of its potential to affect substantially the Secretary's case. Other donning and doffing cases against Tyson Foods and IBP also could be affected substantially.[2] Thus, Tyson Foods shares the same interest as IBP in fully and zealously advocating before this Court on the walking time issue if the Court grants the petition in this case.[3]

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[2] *See Fox* v. *Tyson Foods, Inc.*, No. 99-CV-1612 (N.D. Ala. filed June 22, 1999) (plaintiffs from eight plants seek to certify nationwide action on behalf of current and former employees at 54 plants); *De Asencio* v. *Tyson Foods, Inc.*, No. 2:00-cv-04294-RK (E.D. Pa. filed Aug. 22, 2000) (one plant), *presently on remand from interlocutory appeal*, 342 F.3d 301 (3d Cir. 2003); *Jordan* v. *IBP, inc.*, No. 02-CV-1132 (M.D. Tenn. filed Nov. 21, 2002) (one plant).

[3] For all of these reasons, this case is not at all like *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959). In *The Monrosa*, there was no possibility that review of the question presented could have led to a different result: the plaintiff sought the same relief under two separate claims, and this Court's conclusion that the plaintiff could seek that relief in an in rem action obviated any need to decide whether the plaintiff could also pursue the same relief through an in personam action. Accordingly, neither of the parties had any incentive to litigate the in personam issue. Here, by stark contrast, the United States acknowledges, and respondents do not deny, that some members of the class can receive more money if they prevail on their federal claim. Both parties, therefore, have ample incentives to litigate the federal issue, and this Court's resolution of that issue would plainly be a "judicial, not simply [an] administrative or managerial," act. *Id.* at 184.

Finally, the United States does not urge the Court to deny the petition. Thus, the only real question is whether the walking time issue would be better litigated in this case or in *Tum*. This case is clearly a better vehicle for resolving the walking time issue than *Tum*, which involves only a small number of claimants and vastly smaller potential damages. The appendix in that case suggests that only 25 named plaintiffs went to trial. *See* Pet. App. 20a & n.1, in *Tum* v. *Barber Foods, Inc.*, No. 04-66 (U.S. filed July 8, 2004) (magistrate judge's opinion noting that Barber Foods moved for summary judgment on claims of 41 named plaintiffs, and further recommending dismissal of 16 plaintiffs as discovery sanction). We are informed by counsel for Barber Foods that 22 plaintiffs remain in the case, that the damages claimed by them was approximately $70,000, and that Barber Foods has no other similar cases pending against it. Thus, if the Court were to accept the United States' suggestion and grant review in *Tum* instead of this case, the advocacy on this important issue would be controlled by a party whose interest candidly is trivial compared to that of IBP and Tyson Foods.[4]

II. THE COURT SHOULD GRANT THE PETITION AS TO THE SECOND QUESTION PRESENTED.

1. The United States does not refute IBP's showing that there is confusion in the lower courts as to whether this Court's decision in *Christensen* survives *Mead*, *Barnhart* and *Alaska Department of Environmental Conservation*. See Pet. 19-25. Indeed, the United States concedes that there is significant ambiguity about the extent to which at least "some opinion letters . . . might warrant *Chevron* deference" and that it is an open question whether *Christensen* already has been at least "qualifie[d]," if not overruled, by this Court's

---

[4] Of course, should the Court agree with the United States' suggestion and grant the petition in *Tum*, IBP agrees that this case should be held pending the disposition of that case.

subsequent cases. U.S. 17. Similarly, the United States does not deny that there is significant confusion concerning the degree of deference due less formal agency interpretations of ambiguous statutory terms, and that this issue is an important question of federal law.

Instead, the United States suggests (inexplicably) that the Court should not review this issue because petitioner has not made "the kind of compelling case necessary to justify overruling a decision of this Court." *Id.* at 8. This suggestion confuses the showing IBP must make to prevail on the merits with the showing necessary to justify review of the issue. IBP has more than satisfied the latter standard, which is the relevant standard for present purposes.

The United States further suggests that the Court permit "further ventilation in the courts of appeals." *Id.* at 18. This suggestion ignores the expressions of frustration and open calls for clarification by prominent jurists and commentators alike, Pet. 20-22, both as to the broader deference issue, and the legal status of the very opinion letters at issue in this case. These extraordinary requests for this Court's help demonstrate that this is not the typical situation in which "percolation" will result in crystallization of an issue. Instead, review of this important question is needed now to assist lower courts that are floundering without guidance.

2. The United States' suggestion that the deference issue was not squarely raised below is simply mistaken. As demonstrated in petitioner's reply brief, the issue of what level of deference the courts should give the Department's June 6, 2002 opinion letter was raised at the earliest instance and in adequate detail. Pet. Reply 7-8 & nn.4-5. Petitioner addressed the *Barnhart* factors in substance, if not by name, before the court of appeals.[5] Opp. App. 37a (excerpt from

[5] The *Barnhart* factors are: (1) "the interstitial nature of the legal question"; (2) "the related expertise of the [a]gency"; (3) "the importance of the question to the administration of the statute"; (4) "the complexity of that administration"; and (5) "the careful consideration the [a]gency has given the question over a long period of time." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002).

petitioner's reply brief to court of appeals below); *id.* at 42a-43a (excerpt from petitioner's petition for rehearing to court of appeals below). In addition to raising these very issues, petitioner also cited cases from the *Chevron* line of authority. See *id.* at 37a; *id.* at 42a-43a. Accordingly, there can be no serious question that this issue was pressed below.

3. The United States' efforts to distinguish the Fifth Circuit's decision in *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (per curiam), are inconsistent with its own analysis of the conflict of the walking time issue. The United States relies on the fact that the items of attire in *Bejil* were different from those at issue in the decision below. Specifically, the Fifth Circuit in *Bejil* held that certain "sanitary garments" (such as lab coats, shoe coverings, and hair and beard coverings) were "clothes" within the meaning of Section 3(*o*), whereas in this case the Ninth Circuit held that certain protective attire (including metal aprons and Kevlar gloves) were *not* "clothes" under that provision.

But the facts need not be identical for a conflict in the governing rule of law to be palpable. Indeed, earlier in its brief, even though the United States suggested that the factual differences between *Tum* and the decision below were so stark that the cases might be "capable of being reconciled on their facts," U.S. 9, it explained that there was still a true conflict warranting certiorari because the First Circuit's "holding is directly inconsistent with the holding in the Ninth Circuit in this case," *id.* at 10. Here as well, the holding of *Bejil* is that vocational garments that are worn atop other attire are still "'clothes' under § 203(*o*)." *Bejil*, 269 F.3d at 480 n.3. Applying this principle here, the result would have been the opposite: respondents' protective attire would have been viewed as no less clothing merely because they were worn over non-vocational garments. A number of other

courts have reached the same result. See Reply Br. 8 n.6; see also *Turner* v. *City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001) (correctional officer uniforms, including leather gun holsters worn over top layer of clothing, treated as "clothes" under § 203(*o*)).

* * * *

The petition raises two issues worthy of this Court's review. The United States' reliance on prudential concerns leads to precisely the opposite conclusion offered by the government. The most prudent course would be to grant in this case where petitioner has significant experience litigating these issues, both sides have a keen interest in having them resolved, and are well-equipped to assist the Court in its consideration of this case on the merits.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM A. NORRIS
JOEL M. COHN
REX S. HEINKE
L. RACHEL HELYAR
AKIN GUMP STRAUSS
HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

November 2, 2004

* Counsel of Record

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No. 03-1238

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IN THE

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IBP, INC.,

Petitioner,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
NORINA IRANI EDELMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

MICHAEL J. MUELLER
JOEL M. COHN
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000

Counsel for Petitioner

WILLIAM RUTZICK*
KATHRYN GOATER
SCHROETER GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

DAVID MARK
LAW OFFICE OF DAVID MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Counsel for Respondents

May 16, 2005

* Counsel of Record

PETITION FOR CERTIORARI FILED FEBRUARY 26, 2004
CERTIORARI GRANTED FEBRUARY 22, 2005
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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 03-1238 Petition For A Writ Of Certiorari at the following pages:

Alvarez v. *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003)	1a-34a
Alvarez v. *IBP, Inc.*, No. CT-98-5005-RHW (E.D. Wash. Sept. 14, 2001)	35a-82a

WASHINGTON EASTERN DISTRICT COURT

Case No. 2:98-cv-5005

GABRIEL ALVAREZ, *et al.*,

Plaintiff,

v.

IBP, INC.

Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/30/1998	1	COMPLAINT FOR MINIMUM WAGE ACT AND FAIR LABOR STANDARDS ACT VIOLATIONS (Summons(es) issued) Fee-status: pd Receipt #: 039823 (KH) (Entered: 06/30/1998)
		* * * *
08/17/1998	4	Defendant IBP, Inc.'s ANSWER To Plaintiffs' Complaint (ECH) (Entered: 08/18/1998)
		* * * *
03/08/1999	59	First AMENDED COMPLAINT for Minimum Wage Act and Fair Labor Standards Act violations [1-1] (KH) Modified on 04/23/1999 (Entered: 03/08/1999)
		* * * *
05/07/1999	70	ANSWER by defendant IBP Inc to Plaintiff's First Amended Complaint (KH) (Entered: 05/10/1999)

DATE	NO.	PROCEEDINGS
		* * * *
06/11/1999	72	Stipulation re: class certification (KH) (Entered: 06/15/1999)
		* * * *
08/02/1999	101	Response by defendant to Plaintiff's motion to file a second amended complaint [94-1] (KH) (Entered: 08/05/1999)
		* * * *
08/25/1999	102	ORDER Granting Motion to Amend And Class Certification by Judge Robert H. Whaley (granting motion to amend complaint to add class representatives [94-1] granting motion for (order) Resolving Disputed Class Certification Issues [71-1]) (cc: all counsel) (KH) (Entered: 08/26/1999)
09/10/1999	103	Second AMENDED COMPLAINT for Minimum Wage Act and Fair Labor Standards Act Violations [59-1], [1-1] (KH) (Entered: 09/10/1999)
		* * * *
04/12/2001	664	Findings of fact and conclusions of law by Judge Robert H. Whaley; pltfs to submit obj or clarifications to these findings by 4/27/01; proposed jgm ddl 4/27/01; deft obj ddl 5/11/01; rply ddl 5/18/01; following obj hrg to be set; all outstanding motions are denied as moot except mtn #574 to reconsider rest break claims; parties to submit briefing re issue of injunctive relief COB-179-93 (cc: all counsel) (SAP) (Entered: 04/12/2001)
		* * * *

DATE	NO.	PROCEEDINGS
05/18/2001	669	ORDER by Judge Robert H. Whaley granting pltf's motion for reconsideration of rest break claims [574-1]; w/in 3 wks of this order pltfs to brief re evidence & provide damage figures; parties to schedule 1/2 day of trial time (cc: all counsel) (SAP) (Entered: 05/21/2001)
		* * * *
06/26/2001	718	DAMAGES REPORT by plaintiff (attachments not scanned, filed in separate expando file, Vols. 104-105) (LE) Modified on 06/28/2001 (Entered: 06/26/2001)
		* * * *
07/10/2001	775	Revised Damages Reports by plaintiffs {See Expando File for Attachments) (SAP) (Entered: 07/10/2001)
		* * * *
08/03/2001	828	ORDER on Objections by Judge Robert H. Whaley, plaintiff's objections and clarifications to the court's proposed findings is granted in part and denied in part, [ct. rec. 716] defendant's objections and clarifications to the court's proposed findings is granted in part and denied in part [ct. rec.793] (cc: all counsel) (VR) (Entered: 08/03/2001)
		* * * *
08/28/2001	834	Stipulation for Purposes of Facilitating Rest Break Hearing & Admissibility of Overall Damage Calculations (SAP) (Entered: 08/28/2001)

DATE	NO.	PROCEEDINGS

* * * *

09/14/2001 844 Findings of Fact and Conclusions of Law by Judge Robert H. Whaley: pltfs to present proposed jgm consistent with this Order and w/Court's Order on Objections; court will hear tele oral arg on issue of injunctive relief 10/4/01 at 1:30 p.m.; if parties request oral arg in person, they shall notify Courtroom Dep MF by 10/1/01 COB: 182-95 (cc: all counsel) (LE) (Entered: 09/14/2001)

09/14/2001 845 JUDGMENT: by Judge Robert H. Whaley: pltfs recover of dft IBP sum of $3,098,517.00 w/interest thereon at the rate provided by 29 USC 1961, 3.43%. This jgm based on damages calculated through 5/14/00 and is comprised of $1,751,126.00 in Fair Labor Standards Act (FLSA) overtime damages, $156,344.00 in Washington Minimum Wage Act (MWA) overtime damages for periods preceding the FLSA limitations period, $286,119 in MWA minimum wage damages, and $904,928.00 in rest break damages under Washington law (which includes rest break prejudgment interest); pltfs entitled to costs of action and reasonable attys' fees and costs under applicable state and fed law; pltfs to file mtn to establish these attys' fees w/in 4 weeks from entry of this jgm and to file a cost bill with the Clerk (cc: all counsel) COB: 182-94 (LE) Modified on 11/27/2001 (Entered: 09/14/2001)

DATE	NO.	PROCEEDINGS

* * * *

01/18/2002 988 ORDER by Judge Robert H. Whaley granting motion for stay of execution of judgment pending appeal & for approval of supersedeas bond pursuant to FRCP 62(d) & FRAP 8(a)(1) [967-2]; order is without prejudice to any right of pltfs to apply for further relief under FRAP 8(a) (cc: all counsel) (SAP) (Entered: 01/22/2002)

* * * *

02/26/2002 998 REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/27/00 Type of Proceeding: Bench Trial, Vol 6 of 43, Pgs 81-162 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

02/26/2002 999 REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/28/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 7 of 43, Pgs 163-243 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

02/26/2002 1000 REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/28/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 8 of 43, Pgs 244-321 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1001	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/29/00 Type of Proceeding: Bench Trial, Vol 9 of 43, Pgs 322-480 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1002	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/3/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 10 of 43, Pgs 481-570 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1003	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/3/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 11 of 43, Pgs 571-677 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1004	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/4/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 12 of 43, Pgs 678-771 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1005	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/4/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 13 of 43, Pgs 772-888 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1006	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/5/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 14 of 43, Pgs 889-1020 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1007	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/5/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 15 of 43, Pgs 1021-1109 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1008	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/6/00 Type of Proceeding: Bench Trial, Vol 16 of 43, Pgs 1110-1257 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1009	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/9/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 17 of 43, Pgs 1258-1448 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1010	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/9/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 18 of 43, Pgs 1449-1523 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1011	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/10/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 19 of 43, Pgs 1524-1691 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1012	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/10/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 20 of 43, Pgs 1692-1762 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1013	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/11/00 Type of Proceeding: Bench Trial, Vol 21 of 43, Pgs 1763-1932 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1014	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/12/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 22 of 43, Pgs 1933-2097 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1015	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/12/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 23 of 43, Pgs 2098-2316 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1016	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/13/00 Type of Proceeding: Bench Trial, Vol 24 of 43, Pgs 2317-2501 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1017	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/17/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 25 of 43, Pgs 2502-2601 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1018	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/17/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 26 of 43, pgs 2602-2674 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1019	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Yakima, WA Date: 10/19/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 27 of 43, Pgs 2675-2814 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1020	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Yakima, WA Date: 10/19/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 28 of 43, Pgs 2815-2966 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1021	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/20/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 29 of 43, Pgs 2967-3137 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1022	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/20/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 30 of 43, Pgs 3138-3262 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1023	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/24/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 31 of 43, Pgs 3263-3405 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1024	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/24/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 32 of 43, Pgs 3406-3547 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1025	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/25/00 Type of Proceeding: Bench Trial, Vol 33 of 43, Pgs 3548-3681 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1026	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/26/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 34 of 43, Pgs 3682-3872 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1027	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/26/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 35 of 43, Pgs 3873-3979 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1028	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/27/00 Type of Proceeding: Bench Trial, Vol 36 of 43, Pgs 3980-4216 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1029	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Spokane, WA Date: 11/3/00 Type of Proceeding: Bench Trial, Vol 37 of 43, Pgs 4217-4350 [See Expando File Vol 120] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
		* * * *
02/28/2002	1037	Copy 9CCA certificate of record - Original forwarded to 9CCA 9CCA: 02-35042 (SAP) (Entered: 02/28/2002)
		* * * *

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Court of Appeals Docket No. 02-35042

GABRIEL ALVAREZ, individually and as class representatives; RANULFO GUTIERREZ, individually and as class representatives; PEDRO HERNANDEZ, individually and as class representatives; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellees.

v.

IBP, INC., a Delaware corporation

Defendant-Appellant,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/9/02	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 1/7/02; appellee's designation of RT is due 1/17/02; appellant shall order transcript by 1/28/02; court reporter shall file transcript in DC by 2/27/02; certificate of record shall be filed by 3/6/02; appellant's opening brief is due 4/15/02; appellees' brief is due 5/15/02; appellants' reply brief is due 5/29/02; [02-35042] (crw) [02-35042]
	* * * *
6/6/02	Filed original and 15 copies IBP, Inc.'s first brief on cross-appeal, (Informal : no) of 60 pages and 2 excerpts of record; served on 6/3/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]

DATE	PROCEEDINGS
	* * * *
7/24/02	Filed original and 15 copies plaintiffs second brief on cross-appeal (Informal : no) of 62 pages and 3 vols excerpts of record; served on 7/22/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]
	* * * *
10/8/02	Filed original and 15 copies IBP, Inc.'s third brief on cross-appeal (Informal : no) of 69 pages and 5 copies 1 excerpts of record; served on 10/4/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]
	* * * *
11/19/02	Filed original and 15 copies IBP, Inc.'s [*sic*] reply brief, (Informal : no) of 30 pages & 5 supp exc of record; served on 11/18/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]
	* * * *
4/22/03	FILED CERTIFIED RECORD ON APPEAL IN: 45 clerk's records, 42 reporter's transcripts, 9 under seal exhibits in envs. From dc transmittal. [02-35042] (jk) [02-35042]
	* * * *
8/5/03	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party to bear their own costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Dorothy W. NELSON; Sidney R. THOMAS, author; Susan Y. Illston.) FILED AND ENTERED JUDGMENT. [02-35042, 02-35110] (dg) [02-35042 02-35110]

* * * *

11/28/03 Filed order (Dorothy W. NELSON, Sidney R. THOMAS, Susan Y. Illston): . . . . The petn for rhrg is denied and the suggestion for rhrg en banc is rejected. [02-35042, 02-35110] (crw) [02-35042 02-35110]

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed Sep. 10, 1999]

No. CT-98-5005 RHW
CLASS ACTION

GABRIEL ALVAREZ, VIRGINIA ALVAREZ, MARIA CHAVEZ, RANULFO GUTIÉRREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, and ISMAEL RODRIQUEZ, individually and as class representatives,

Plaintiffs,

v.

IBP, INC., a Delaware Corporation,

Defendant.

SECOND AMENDED COMPLAINT FOR MINIMUM WAGE ACT AND FAIR LABOR STANDARDS ACT VIOLATIONS

Jurisdiction

1. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b) over plaintiffs' Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA") claims. The Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over plaintiffs' state law claims which are based on the Minimum Wage Act, RCW chapter 49.42 ("MWA"), Industrial Welfare Act, RCW chapter 49.12, Wages-Deductions-Contribution-Rebates Act, RCW chapter 49.52 and regulations issued thereunder.

Parties

2. Plaintiffs Gabriel Alvarez, Maria Chavez, Ranulfo Gutierrez, Pedro Hernandez, Maria Martinez, Ramon Moreno,

and Ismael Rodriquez are adults employed at defendant's Pasco, Washington plant and have been so employed during the three years prior to the filing of this complaint. Virginia Alvarez is adult who was employed at defendant's Pasco, Washington plant from approximately 1991 until early 1999.

3. Defendant IBP, Inc. is a Delaware Corporation headquartered in Dakota City, Nebraska. It is the world's largest producer of fresh beef, pork and related allied products. It operates a beef slaughtering and processing plant that it commonly refers to as its Pasco plant.

Facts

4. Plaintiffs are employed by defendant at its Pasco plant, with the exception of Virginia Alvarez whose employment with defendant ceased in early 1999.

5. Plaintiffs have been employed by defendant at the Pasco plant for periods ranging from approximately 5 years to more than 15 years.

6. During the past 5 to 15 years, plaintiffs have worked and continue to work in the Pasco plant processing or slaughtering divisions.

7. Plaintiffs are employed and have been employed by defendant during the past three years in an enterprise engaged in commerce and in the production of goods for commerce, as these terms are used in Sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206-207.

8. Plaintiffs perform unpaid work each morning, including, but not limited to, activities such as donning protective equipment (wire mesh gloves, wire mesh aprons, protective sleeves, rubber gloves, cloth gloves, plastic gloves, safety boots, scabbards, hard hats, safety glasses, hairnet, earplugs and other equipment), receiving and donning outer gloves, obtaining sand paper, obtaining knives, sanding their steel (equipment used to sharpen knives), waiting in line during these previous activities, and performing production floor work.

9. Plaintiffs have thirty-minute meal periods deducted from their pay, even though a substantial amount of their meal period is devoted to work activities such as production floor work after the start of the meal period, doffing safety equipment and related garments, cleaning themselves and equipment, donning safety equipment and related garments, and returning to work on the production floor prior to the end of the thirty-minute meal period.

10. Plaintiffs work more than 8 hours in a day without receiving a second paid rest break.

11. Plaintiffs perform unpaid work after the official end of the paid work day, including but not limited to activities such as completing production floor work, doffing safety equipment and related garments, cleaning safety equipment, bagging gloves and garments, storing safety equipment in lockers and waiting in line at various steps in the above-described process.

12. Plaintiffs clock in at or near the beginning of the workday and clock out at or near the end of their workday, but are paid based on the official start and stop time, which excludes work performed before and after official hours.

13. Much of plaintiffs' off-the-clock work is performed in workweeks in which plaintiffs work in excess of forty hours.

14. Plaintiff Ramon Moreno works in the slaughter division and for approximately 2 years has worked under an incentive wage, where employees are paid a daily productivity bonus to the extent that they complete assigned work in advance of allowed time for the work. That productivity bonus is not included as part of Mr. Moreno regular rate of pay for purposes of calculating state and federal overtime premium pay.

15. Plaintiffs have been and continue to be subject to a rule under which deductions are made from their wages for company equipment that is lost or stolen without their being involved in any dishonest or willful act. For example, in July 1996, plaintiff Ranulfo Guttierez suffered such a $197 equipment deduction that brought his pay to below state and federal minimum wage. The equipment deduction does not accrue to the benefit of the plaintiffs. Instead, the employer derives a financial benefit by obtaining wage rebates to cover missing company equipment, much of which is found and used in production work without reimbursing the employees who paid for the equipment.

16. The events described hereinabove were continuing at the time of the complaint and amended complaint, and, on information and belief, will continue.

17. Defendant has been and continues to willfully violate state and federal wage and hour statutes and regulations with the intent to deprive plaintiffs of a part of their wages.

18. Defendant has been engaged in extensive similar litigation with the United States Department of Labor and with private parties, resulting in final judgment affirmed in *Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997) and *Bernard v. IBP, Inc.*, 154 F.3d 259 (5th Cir. 1998), such that collateral estoppel should be applied against defendant from these judgments and other judgments presently unknown to plaintiffs on issues that will likely arise during this litigation.

Class Facts

19. Plaintiffs file this action on behalf of themselves and a class defined as follows:

> All individuals performing production work in defendant's Pasco plant processing and slaughtering divisions, during any time between June 30, 1995 to the present time, excluding supervisors, managers, quality control

> employees, guards, mechanics, laundry room employees, janitors, knife room employees, rendering employees, and packaging work performed outside the production line vicinity.

20. Class members are employed and have been employed by defendant during the past three years in an enterprise engaged in commerce and in the production of goods for commerce, as these terms are used in Sections 6 & 7 of the FLSA, 29 U.S.C. §§ 206-207.

21. Class members perform unpaid work each morning, including, but not limited to, activities such as donning protective equipment (wire mesh gloves, wire mesh aprons, rubber aprons, protective sleeves, rubber gloves, cloth gloves, plastic gloves, safety boots, scabbards, hard hats, safety glasses, hairnets, ear plugs and other equipment), receiving and donning outer gloves, obtaining sand paper, obtaining knives, sanding their steel (equipment used to sharpen knives), waiting in line during these previous activities, and performing production floor work.

22. Class members have thirty minute meal periods deducted from their pay, even though a substantial amount of their meal period is devoted to work activities such as production floor work after the start of the meal period, doffing safety equipment and related garments, cleaning themselves and equipment, donning safety equipment and related garments, and returning to work on the production floor prior to the end of the thirty-minute meal period.

23. Class members work more than 8 hours in a day without receiving a second paid rest break.

24. Class members perform unpaid work after the official end of the paid work day, including but not limited to activities such as completing production floor work, doffing safety equipment and related garments, cleaning safety equipment, bagging gloves and garments, storing safety equipment

in lockers and waiting in line at various steps in the above-described process.

25. Class members clock in at the beginning of their work day and clock out at the end of their work day, but are nonetheless paid based on the official start and stop time, which excludes work performed before and after official hours.

26. Much of the class members' off-the-clock work is performed in workweeks in which class members work in excess of forty hours.

27. For approximately two years, class members in the slaughter division have worked under an incentive wage, where employees are paid a daily productivity bonus to the extent that they complete assigned work in advance of allowed time for the work. That productivity bonus is not included as part of the employees' regular rate of pay for purposes of calculating state and federal overtime premium pay.

28. Class members have been and continue to be subject to a rule under which deductions are made from their wages for company equipment that is lost or stolen without their being involved in any dishonest or willful act. Such deductions sometimes reduce pay to below state and federal minimum wage. The equipment deduction does not accrue to the benefit of the plaintiffs. Instead, the employer derives a financial benefit by obtaining wage rebates to cover missing company equipment, much of which is found and used in production work without reimbursing the employees who paid for the equipment.

29. The events described hereinabove were continuing at the time of filing of the complaint and first amended complaint, and, on information and belief, will continue.

30. Defendant has been and continues to willfully violate state and federal wage and hour statutes and regulations with the intent to deprive class members of a part of their wages.

31. Defendant has been engaged in extensive similar litigation with the United States Department of Labor and with private parties, resulting in final judgment affirmed in *Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997) and *Bernard v. IBP, Inc.*, 154 F.3d 259 (5th Cir. 1998), such that collateral estoppel should be applied against defendant on these judgments and other judgments presently unknown to the class members on issues that will likely arise during this litigation.

32. The proposed class numbers in excess of 2,000 individuals and, therefore, joinder of all members is impracticable.

33. There are questions of law and fact common to the class.

34. Virtually all legal issues in this case will be common class issues, such as state law lunch and rest break issues, MWA statute of limitations issues, legal similarities and dissimilarities between the MWA and FLSA, FLSA work and Portal-to-Portal act issues, FLSA meal break issues, interpretation of 29 U.S.C. § 203(o), deference to be given to the Wage and Hour Opinion entitled "Hours Worked/Cleaning, Putting on Safety Gear" (December 3, 1997), collateral estoppel issues based on *Metzler v. IBP, Inc.*, and *Bernard v. IBP, Inc., supra*, legal issues raised by affirmative defenses advanced by defendant, and other legal issues which will arise during this litigation.

35. Class members share numerous common issues of fact, involving matters such as amounts of time it takes to do various activities, the time that production floor work begins and ends in relation to paid starting and stopping time, liability and damages issues which will be tried applying

MWA and FLSA principles of representative evidence, and the willfulness of defendant's violations for purposes of RCW 49.52.050 & .070 exemplary damages and the FLSA 3-year statute of limitations, 29 U.S.C. § 254.

36. The claims of the representative parties are similar to the class claims. See allegations *supra* and *infra*.

37. The named plaintiffs will fairly and adequately protect the interests of the class and have made arrangements with experienced counsel to represent the class members with vigor and zeal within the bounds of the law.

38. The questions of law and fact common to the members predominate over any questions affecting only individual members, particularly in light of the rules of representative evidence and the relaxed burdens of proof in MWA and FLSA cases.

39. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

40. Individual class members have little interest in individually controlling the prosecution of their claims given the relatively small amounts of each claim, their relative lack of sophistication, and the difficulties involved in bringing individual litigation against one's current employer.

41. Plaintiffs are unaware of any other litigation concerning this controversy commenced by or for other class members.

42. This litigation should be concentrated in this forum because all class members were employed in defendant's Pasco plant, located within this forum.

43. The Court has the resources, abilities and procedures to effectively manage this class action, particularly with application of the substantive wage and hour law of representative evidence and relaxed burdens of proof.

44. Defendant has been and continues to willfully violate state and federal wage and hour statutes and regulations with the intent to deprive class members of a part of their wages.

First Claim—State Wage and Hour Law Violations

45. Plaintiffs repeat and reallege the prior allegations of the complaint as if repeated completely.

46. Defendant violates RCW 49.46.020 by permitting unpaid work to be performed prior to and after the start of the paid workday.

47. Defendant violates RCW 49.46.130 by permitting plaintiffs and class members to perform off-the-clock overtime work, *i.e.*, unpaid work performed by an employee who has worked in excess of forty hours during a week.

48. Defendant violates RCW 49.46.130 by failing to include slaughter division incentive pay as part of the regular rate for purposes of calculating overtime premium pay.

49. Defendant violates RCW 49.46.020, RCW 49.46.130, RCW 49.12.005 and WAC 296-126-092 by failing to pay for meal breaks that are less than 30 minutes, the minimum length for an unpaid meal break under state law.

50. Defendant violates RCW 49.12.005 and WAC 296-126-092 by failing to provide a second 10-minute rest break on days when plaintiffs work 8 hours or more.

51. Defendant violates RCW chapter 49.12, RCW 49.52.050-49.52.070 and, WAC 296-126-025 by deducting the cost of lost or stolen equipment from wages of employees who have not been engaged in any dishonest or willful act relative to the lost or stolen equipment, a deduction that is not for the benefit of employees and on which defendant derives financial gain. Defendant violates RCW 49.46.020 when the deduction brings the employee's realized wages below minimum wage.

52. Defendant violates RCW 49.52.050 and RCW 49.52.070 by willfully and with intent to deprive class members of wages, failing to pay wages owed pursuant to statute.

Second Claim—Fair Labor Standards Act Violations

53. Plaintiffs repeat and reallege the prior allegations of the complaint.

54. Plaintiffs and class members are similarly situated with regard to the claims made in this complaint.

55. Defendants violates Section 6 of the FLSA, 29 U.S.C. § 206, by deducting equipment cost from wages and not paying for hours worked, when the net effect of these violations is to effectively reduce the employee's average hourly earnings for the workweek to below the FLSA minimum hourly wage.

56. Defendant violates the overtime provisions of Section 7 of the FLSA, 29 U.S.C. § 207, by permitting unpaid overtime work, including unpaid overtime work prior to the start of the paid work day, during meal periods that do not qualify as bona fide meal periods pursuant to FLSA regulations and case law, and after the end of the paid work day.

57. Defendant violates the overtime provisions of Section 7 of the FLSA, 29 U.S.C. § 207, by failing to include slaughter division incentive pay in the regular rate for purposes of calculating the overtime premium.

Prayer for Relief

Wherefore, plaintiffs, individually and on behalf of the class, pray for relief as follows:

1. With regard to the state law claims, plaintiffs pray for Fed.R.Civ.P. 23(b)(2) and 23(b)(3) class certification, damages, exemplary damages, prejudgment interest, costs, attorney fees pursuant to RCW 49.46.090, RCW 49.48.030, RCW

49.52.070 and equitable grounds, and for such other and further relieve[sic], including final injunctive relief, as the Court deems just and equitable;

2. With regard to the FLSA claims, plaintiffs pray for FLSA class certification pursuant to 29 U.S.C. § 216(b), damages, liquidated damages, prejudgment interest, costs, attorney fees pursuant to 29 U.S.C. § 216(b), and such other and further relief as the Court deems just and equitable.

DATED this 20th day of July 1999.

LAW OFFICE OF DAVID N. MARK

/s/ David N. Mark
by: DAVID N. MARK (WSBA #13908)

SCHROETER, GOLDMARK & BENDER

/s/ William J. Rutzick
by: WILLIAM J. RUTZICK (WSBA# 11533)
Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed Aug. 3, 2001]

NO. CT-98-5005-RHW

GABRIEL ALVAREZ, *et al.*,
Plaintiffs,

v.

IBP, INC., a Delaware corporation,
Defendant.

ORDER ON OBJECTIONS

A hearing was held on July 27, 2001. Before the Court are Plaintiffs' Objections and Clarifications to the Court's Proposed Findings (Ct. Rec. 716) and Defendant's Objections and Clarifications to the Court's Proposed Findings (Ct. Rec. 793). Plaintiffs were represented by William Rutzick; Defendant by Barbara Duffy and Nancy Anderson. This will memorialize the Court's oral rulings.

DISCUSSION

I. Plaintiffs' Objections

A. Meal Break Damages

Plaintiffs request that the Court clarify or, in the alternative, reconsider its Findings and Conclusions related to the amount of recovery for meal-break violations. Plaintiffs contend that the entire 30 minutes of the meal break should be recovered. Additionally, Plaintiffs argue that *Wingert v. Yellow Freight*, 104 Wash. App. 583 (2000), which holds that WAC 296-126-092 does provide a private right of action for rest break violations, also would apply to meal-break violations and, therefore, recovery of the full 30 minutes is required.

The Court clarifies its conclusion to only allow recovery for the time spent working during the meal break up to 10 minutes under the state law claim. If the time spent working during the meal break exceeds 10 minutes, so that the total uninterrupted meal break is less than 20 minutes, the entire 30 minute period shall be recoverable. This conclusion is based on the fact that the Plaintiffs' claim under the MWA is brought to compensate employees for time worked for which they were not compensated. The interpretive guideline under the WAC 296-126-092 indicates that if an employee works during the meal period, the period is to be extended to give the employee a 30-minute meal break. This indicates to the Court that the purpose of both the MWA and the regulation are to allow for time as a remedy for a violation, not necessarily monetary compensation for the entire meal break, when only a portion of the meal break is spent working. This finding is also consistent with the FLSA provision for meal-break violations.

B. Class Work Codes

Plaintiffs move for the class member damages to be based on work codes set forth in exhibits 74 and 75, which were the documents relied upon in the Proposed Findings, and wish to include those codes in "exhibit 1048 and the record herein." Ex. 1048 was a stipulated exhibit, which set forth which packaging department jobs are in the class and which are not. IBP does not object to the inclusion of packaging jobs referenced in exhibit 1048, and these work codes will be included.

Additionally, Plaintiffs wish to include class codes that are not in exhibits 74, 75, and 1048, but which were testified to at trial and are contained in exhibits. These codes involve saw operator jobs and other jobs appearing on IBP's list of jobs (Ex. 369a and 370a-d) and were testified to by Superintendents Salter and Johnson. Plaintiffs are permitted to rely upon representative testimony to establish the equipment used

and work performed by class members in job codes, as long as the evidence was introduced at trial. Plaintiffs provided a list in Appendix A, which includes references to testimony and exhibits that support inclusion of these job categories. These work codes will be included if admissible evidence was introduced at trial about the job so that the appropriate equipment can be determined from the admitted evidence.

Defendant objects on the grounds that because the Court ordered that damages should be awarded on an individualized basis, the Plaintiff should not be able to use representative evidence to demonstrate what work was performed by what job codes. This argument rests on a fundamental misunderstanding of the Court's proposed Findings and Conclusions. The Court's proposed Findings and Conclusions, although concluding that damages should be determined on an individualized basis, also held that the foundation for determining what job categories were entitled to damages and in what amount, were to be determined by reference to the representational evidence. The Court held that the representational evidence was adequate to determine what work was done and in what amounts. To read the Court's holding consistent with the Defendant's interpretation would mean that only those Plaintiffs who testified at trial are entitled to recovery. That was clearly not the Court's intent. As the Court stated in the Proposed Findings and Conclusions "the documentary and expert testimony provide the evidence for jobs not testified to by employees. IBP documents identify which jobs at the Pasco plant require protective equipment. (Ex. 74.) Documents also identify jobs for which protective equipment is not required. (Ex. 75.) Internal documents demonstrate which equipment must be removed prior to employees going to lunch or to break. (Exs. 82 and 83.) Other evidence presented indicated which jobs require which items of personal safety equipment. (Exs. 90-93.) Plaintiffs' expert developed average observed times for most activities performed by employees. (Ex. 1035.) Both IBP's and Plaintiffs'

experts performed auditing exercises for certain activities for each position. (Ex. 358-363.)" What the Court intended by referencing individualized damage calculations was to develop more narrow categories than the ones proposed by the parties, of slaughter and processing or knife-carrying and nonknife-carrying job categories. The Court believes that the evidence presented at trial allows for more narrow definitions of job categories, and that calculating damages on the more narrow categories is the most accurate method of determining damages. It was for this reason that the Court determined that the day began with the donning of the first compensable piece of equipment, and also allotted average times for various equipment donning and doffing. It was also for this reason that the Court indicated that even as to jobs for which there was no testimony, recovery would be permitted and could be determined from the expert testimony and trial exhibits.

C. Damage Calculations

Plaintiffs' damage calculations are based on CD-ROM data through January 30, 2000 and the Mobius payroll data from February 6, 2000 to May 14, 2000.

1. Dr. Abbot's calculations

Defendant objects to the use of Dr. Abbot's calculations on the grounds that the calculations are new evidence. The Court overrules this objection. Defendant argues that the calculations are based on new evidence, new job codes, new assumptions about minimum equipment requirements, and new testimony from class members. The Court has resolved these issues and determines that Dr. Abbot is simply using the information already in evidence and ruled on by this Court to determine damage calculations. Furthermore, according to Dr. Abbot, the Mobius data includes the same information as the CD-ROM, (which was admitted into evidence) but, unlike the CD-ROM, it covers pay periods after January 30, 2000.

Dr. Abbot's manipulation of the admitted data is not new evidence. If the Defendant has objections to the calculations the Court will consider a motion to repopen the testimony on this limited issue.

2. Mobius Data

Defendant objects that Plaintiffs failed to identify what Mobius data they intend to rely upon to form the basis for judgment from January 30 through May 14, 2000, and that Mobius data for the 4 months from January 30, 2000 to May 14, 2000 was never introduced at trial and never admitted into evidence. Defendant asserts that this evidence was not produced by IBP, as it was altered by counsel for Plaintiffs at one time. The Court overrules these objections. Plaintiffs identify Exhibit 178(b), which indicates that it calculates damages for "[w]eek ending dates February 6, 2000 through May 14, 2000 based upon Mobius (PFA) reports." If, after the re-calculations have been performed, the Defendant identifies problems in the data or calculations for the Court, the Court will consider a motion to reopen the testimony on this limited issue.

3. Pre-judgment Interest

Prejudgment interest is allowable only when (1) an amount claimed is "liquidated;" or (2) the amount of an "unliquidated" claim is for an amount of money that is "determinable by computation with reference to a fixed standard contained in [a] contract, without reliance on opinion or discretion." *Prier v. Refrigeration Eng'g Co.*, 74 Wash. 2d 25, 32, 442 P.2d 621 (1968). A "liquidated" claim is defined as one whose "exact amount is fixed and known." *Prier*, 74 Wash. 2d at 32, citing Charles T. McCormick, Damages (Hornbook Series), § 54 (1935); *See also Taylor v. Shigaki*, 84 Wash. App. 723, 732 (1997). Defendant argues that the meal-break claims are not for a sum determinable without reliance on opinion or discretion as there is no precedent in this area. This argument rests on a misperception of the requirement of a

fixed standard and of what pre-judgment interest is designed to accomplish.

Prejudgment interest is not awarded only in those cases where the law is clear on whether the amount claimed is owed but, rather, once it is determined that the amount is owed, whether the amount can be determined with exactness. "The fact that a dispute exists over all or part of a claim does not make the claim unliquidated. This is true 'even thought the adversary successfully challenges the amount and succeeds in reducing it.'" *Aker Verdal v. Neil F. Lampson, Inc.*, 65 Wash. App. 177, 190 (1992), quoting *Pier* at 33. "It follows from the foregoing that, where the amount sued for may be arrived at by a process of measurement or computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest." *Prier* at 33-34. Here, the amount of recovery for the time spent working during the meal period is the time spent working, and if that time extends beyond 10 minutes, the entire 30-minute period is recoverable. The compensable time is easily determined by looking to the pay rates for employees and calculating the time spent working during the meal break on days where a meal break was required. Finally, prejudgment interest is not to punish Defendant but, rather, to compensate the Plaintiffs for money wrongfully withheld. "Prejudgment interest is not a penalty imposed on a defendant for wrongdoing nor is its purpose to deter wrongdoing." *Hansen v. Rothaus*, 107 Wash. 2d 468, 475 (1987).

Defendant claims that pre-judgment interest is also part of the Plaintiffs' damage calculation on the rest break—this will be addressed at the hearing on the rest break evidence.

4. Damages to May 14, 2000—No Judgment Bar Thereafter

Plaintiffs indicate that they have detailed electronic payroll data only through the week ending May 14, 2000, which was

near the end of discovery. They request that the Court's final findings calculate damages through this period and hold that work performed thereafter is not being subject to any judgment bar. Plaintiffs are capable of running projections, but do not want to do so as it raises various issues for appeal. Defendant objects to Plaintiffs' damage calculations, which would allow a future supplemental order as the Court's findings in this case would not be a final order. The Court will issue a final judgment on the issue with damages calculated through May 14, 2000. The Court will not hold that work performed thereafter is or is not subject to any judgment bar.

5. May Provide Duplicate Recovery

Defendant objects that Plaintiffs' damage calculations may provide for duplicate recovery under FLSA and MWA because where the MWA damages are not higher than the FLSA damages, Dr. Abbot has applied a calculation to attempt to factor in the MWA's statute of limitation and other differences with the FLSA. Defendants argue that this results in a rough estimate, in violation of the individualized damages notion. As outlined above, the Court does not see a rough estimate of damages a violation of its order that damages should be considered on an individualized basis. However, the Court reiterates that Plaintiffs are entitled to recovery on one theory only.

D. Equipment Beyond the Minimal Equipment List

Plaintiffs have matched work codes with the equipment sets in IBP's Required Equipment Lists in Exhibits 90-93. Plaintiffs also indicate that certain job codes require additional safety equipment, which is not identified on IBP's Required Equipment List, but about which there was testimony and other evidence introduced at trial. Plaintiffs seek to have these other activities included in damages calculations. The requested additional activities are outlined below. The Court finds that the representational testimony was adequate

in proving what additional equipment was required beyond the Required Equipment Lists. As the Court indicated in its Proposed Findings and Conclusions on the representational evidence, "[t]he combination of this evidence convinces the Court that employees have, in fact, performed work for which they were improperly compensated, and that they have produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."

While the Court concluded that the MWA and the FLSA protect individual rights and that damages should be calculated on an individualized basis, it also determined that it was satisfied by the amount and quality of representational evidence and that it was "untroubled here, based on the combination of employee testimony, documentary evidence, and expert testimony." *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (holding that while the testimony of the five employee witnesses was inconsistent in terms of exact days and hours of overtime, they had established "'as a matter of just and reasonable inference' that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays.")

"The employee testimony established that pre- and post-shift and meal-time work activities were unpaid, what activities were being performed during these times, and the time each activity takes to complete. Just over 40 employees of IBP's Pasco Plant testified at trial; 25 employees from the Processing Division testified, and employees from the Slaughter Division testified to over 40 job positions. Each employee testified to their various pre- and post-shift activities, as well as their donning and doffing practices during the 30-minute meal break period. While it is true that employees vary in some of the equipment they are required to don and doff, each employee spent some uncompensated time both pre- and post-shift and during the 30-minute meal break. Most employees share at least some of the required protective

equipment." The Court also had the benefit of visiting and viewing the operations at the IBP Plant in Pasco, Washington.

1. Scabbards and steels in straight knife user equipment sets.

The Court grants Plaintiffs' request to include scabbards and steels in straight knife user equipment sets. Straight knife usage is determined from the record of testimony from Salter and Johnson. Defendant does not object to this inclusion.

2. Two cloth gloves for every job code in processing.

Plaintiffs' request to include two cloth gloves for every job code in processing is granted. Defendant objects and cites to the Plaintiffs' excluded declarations, which do not indicate cloth gloves on equipment lists. The Court will include the two cloth gloves, as the evidence at trial was that the gloves are "integral and indispensable." As the Court indicated in its proposed findings "[t]he workers testified that they could not hold the knives safely without the clean gloves because of the blood and fat that made them slip. Many workers changed their gloves multiple times a day in order to keep them clean. Some had as many as six to eight pair that they changed throughout the day. In addition to safety concerns, the employees testified that the gloves were necessary as insulation from the cold of the refrigerated carcasses and the cold temperature of the processing floor. Cold hands made it more dangerous to use knives, saws, and other types of cutting equipment."

3. Three cloth gloves for knife users in processing.

Plaintiffs' request to include three cloth gloves for knife users in processing is granted. The Defendant objects on the grounds that these are not indicated in the Plaintiffs' excluded post-trial declarations. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits, which indicate three cloth gloves were used by knife carriers in

processing. (Maria Salvi p. 31, 41-42, 43-44, 45-46, Ex. 1000; Rufino Vasquesz p. 30, Ex. 1001; Modesto Reynaga p. 14-15, Ex. 1002; Martina Sanchez p. 15, Ex. 1004.) Defendant points to no admitted evidence that refutes that knife users in processing do not use three cloth gloves.

The Court finds that three cloth gloves are "integral and indispensable" to knife users in processing, and this time is compensable.

4. A rubber apron for saw operators in processing.

Plaintiffs' request to include a rubber apron for saw operators in processing is granted. The Defendant objects on the grounds that this information is, again, not indicated in the Plaintiffs' excluded declarations of saw operators. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits which indicate a rubber apron was worn by saw operators. (Jose Zamora p. 47, Ex. 1003; Victor Rangel Ex. 1016; Pedro Piceno p. 18.) Defendant points to no admitted evidence that refutes that saw operators in processing wear rubber gloves. The Court finds a rubber apron is "integral and indispensable" to saw operators in processing, and this time is compensable.

5. Two yellow plastic sleeves and a weight belt for packaging workers in processing.

Plaintiffs' request to include two yellow plastic sleeves and a weight belt for packaging workers in processing is granted in part and denied in part. The Defendant objects on the grounds that this equipment is not required, and that many of Plaintiffs' excluded declarations cite only one or the other. The Court concludes that two yellow plastic sleeves are "integral and indispensable" to packaging workers in processing, and that this time is compensable, but does not find the same for the weight belt, as testimony regarding the weight belt varied for individual workers.

6. Two rubber gloves to workers on the hamburger codes in processing.

Plaintiffs' request to include two rubber gloves for workers on the hamburger codes in processing is granted. Defendant objects again, pointing to Plaintiffs' excluded declarations. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits that indicate hamburger workers in processing wear two rubber gloves. (Maria Espinoza p. 13, Ex. 1023; Sofia Gutierrez, Ex. 1014; Victoria Vaca, Ex. 1019.) Defendant points to no admitted evidence that refutes that hamburger workers in processing wear two rubber gloves. The Court finds that two rubber gloves are "integral and indispensable" to workers on the hamburger codes in processing and this time is compensable.

7. Two cloth gloves to steam vac operators in the slaughter division.

Plaintiffs' request to include two cloth gloves to steam vac operators in the slaughter division is granted. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits that indicate steam vac operators in the slaughter division wear two cloth gloves. (Patsy Tovar p. 16-17; Ex. 1039; Rosario Robles Ex. 1042; Enedina Ramirez p. 14, Ex. 1043.) Defendant points to no admitted evidence that refutes that steam vac operators in the slaughter division wear two cloth gloves. The Court finds that two cloth gloves are "integral and indispensable" for steam vac operators in the slaughter division, and that this time is compensable.

8. Two rubber gloves and a rubber apron to straight knife, whizzard, and air knife users in slaughter.

Plaintiffs' request to include two rubber gloves and a rubber apron to straight knife, whizzard, and air knife users in slaughter is granted. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits which in-

dicate that particular knife users in slaughter wear two rubber gloves and a rubber apron. (Air Knife Users—Arturo Aguillar Ex. 1034; Miguel Lopez Ex. 1033; Luis Moreno p. 34, Ex. 1024, Antonio Martinez p. 7, Ex. 1045; Rosario Robles, p. 6, Ex. 1042; Jose Santiago Ex. 1027. Knife Users Patsy Tovar p. 5, 11, Ex. 1039; Miguel Alvarado Ex. 1030; Paz Arroyo Ex. 1041; Cruz Escobar Ex. 1029; Pedro Galvan, Ex. 1047; Salvador Guzman Ex. 1031; Miguel Lopez Ex. 1033, etc.) Defendant points to no admitted evidence that refutes that knife users in slaughter wear two rubber gloves and a rubber apron. The Court finds that two rubber gloves and a rubber apron are "integral and indispensable" to straight knife, whizzard, and air knife users in slaughter, and that this time is compensable.

F. Allocation of Activities to Work Codes

1. Walk time from the locker to work station and work station to locker

Defendant objects to walk time from the locker to work station and work station to locker for all class members. The Court rejects this objection as to employees who wear compensable protective equipment. As noted in the proposed findings, most processing and slaughter employees don compensable safety equipment in the locker room. Thus, if the employees' first compensable activity is donning equipment in the locker room, they are to be compensated from then on. As the Court's Findings and Conclusions held

> [t]he employee is, thus, to be paid upon arrival at his or her locker when he or she dons his or her first piece of compensable safety equipment. The employee's day ends when he or she has washed and removed his or her last piece of equipment and placed it in his or her locker. The employer has chosen to store the items in the employees' lockers and, thus, the employees will be paid from the time of arrival at their locker until the last piece

> of equipment is put away. This time is not based on a locker-to-locker theory of the work day, but rather on the reality that the worker dons his or her first piece of equipment upon arrival at his or her locker.

The Court finds that this time is not compensable for cloth glove wearers who do not wear any other compensable equipment. These employees are to be compensated for the time spent waiting for gloves and from then on, including walking from the cafeteria, where gloves are retrieved, to the work station.

Defendant seeks to exclude walk time to the cafeteria to get gloves from processing employees who are compensated for locker-to-work-station walk time. Defendant identifies these as mostly knife-carriers. The Court rejects this objection, as the evidence demonstrated that the gloves were distributed in the cafeteria, and that employees were required to go their locker and then go to the cafeteria to retrieve gloves. Since compensable time begins with the donning of compensable equipment at the locker, walk time to the cafeteria to get gloves is included for processing employees, except B-shift employees, who only wear gloves, where the evidence indicated that employees do not wait to get gloves in the cafeteria[1]. As the Court held in its Findings and Conclusions "[w]alking time is compensable if it occurs after the start of the work day. 29 U.S.C. § 254(a). Walking time is excluded under the Portal to Portal Act only if it occurs 'either prior to the time on any particular work day at which such employee commences, or subsequent to the time on any particular work day at which he ceases, such principal activity or activities.' *Id.* The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time."

[1] Although the Court does hold that these employees are entitled to compensation for time waiting to get gloves.

3. [sic] Walk from work station to cafeteria and walk from cafeteria to work station

Defendant objects to the inclusion of time for walking from work station to cafeteria and walking from cafeteria to work station to all class members. IBP argues that walking to the cafeteria at meal break is primarily for the employees' benefit, per *Anderson v. Mt. Clemons Pottery Co.*, 69 F. Supp. 710, 719 (1947) and is, therefore, not compensable. The Court accepts this objection, in part, and orders that employees will not be compensated for walk time to the cafeteria at the meal break, but will be compensated for the time it takes to don and doff equipment during the meal break.

4. Wait for wash to all class members

Defendant objects to wait for wash time to all class members. Where any compensable equipment is required, wait for wash time will be included. The Court will not limit wait to wash time to mesh equipment. The Court found that workers "hose down and scrub aprons, sleeves, rubber gloves," and the evidence indicated an average wait for wash time is required. Wait to wash time shall be given to all employees wearing compensable protective equipment.

5. Wash and Clean Equipment

Defendant objects to the wash and clean equipment time for all class members. Where any compensable equipment is required, wait for wash time will be included. The Court will not limit wait to wash time to mesh equipment. The Court found that workers "hose down and scrub aprons, sleeves, rubber gloves," and the evidence indicated an average wait for wash time is required. Wash and clean equipment time will be given to all employees wearing compensable protective equipment.

6. Handle equipment, get ready, put away

Defendant objects to the inclusion of time for "handle equipment, get ready and put away" for all class members. All job categories using compensable equipment on the slaughter or processing floor will be compensated for this time.

7. Wait and Obtain Gloves

Defendant objects to time given to processing employees on the B shift for wait and obtain gloves time, as distribution is different from the A shift. The Court finds that gloves are integral and indispensable, and the wait time is compensable for employees on both processing shifts.

F. Clarifications

Plaintiffs withdrew their request that the Court correct the proposed findings by indicating on Page 6, line 22 that processing employees get a frock after going to their locker room.

Plaintiffs request that the Court amend Page 11, line 5 to indicate a total of 815 class members. The Court will amend the Order with this number.

Plaintiffs request the Court to fill in blank exhibit numbers with specific exhibits they have identified. The Court will supplement the Order with these exhibit numbers.

II. Defendant's Objections

A. Willfulness, Statute of Limitation, Double Damages and Representative Evidence

Defendant objects to the Court's findings on willfulness, the statute of limitation, double damages, and the adequacy of the representative testimony. The Court is not in a posture to reconsider its substantive legal conclusions and will not consider these arguments at this time.

The Court also will not reconsider arguments relating to the factual showings. The Court will address any mistakes or clarifications, but will not consider the same arguments that were made at trial and in motion practice on which a ruling already has been made.

B. Objections Related to Pasco Plant

1. Page 1, Footnote 1: *job classifications are staffed with multiple workers, and workers who work alongside each other . . . using virtually the same equipment.*

The Court rejects Defendant's objection to Page 1, footnote 1 which indicates that job classifications are staffed with multiple workers, and workers who work alongside each other . . . using virtually the same equipment. The Defendant argues that the evidence was that employees wear different types as well as quantities of protective clothing. The entire text of the footnote does not indicate that the Court was concluding that workers who work alongside each other wear virtually identical protective clothing but, rather, that workers who do work side by side have different work code classifications. Additionally, the Court found the representational evidence adequate, and that many class members wear the same equipment.

2. Page 3, line 10-12: *Sunshine pay is extra compensation for working more efficiently and more quickly.*

Defendant objects to this description of Sunshine Pay. The Court rejects this objection, based on the testimony received at trial.

C. Objections Related to "Bargaining History" Section

1. Page 3, line 13: *The majority of workers at IBP's Pasco plant are Hispanic.*

Defendant objects that there was no testimony relating to the overall characteristics of the class. The Court rejects this objection, based on the testimony received at trial.

D. Objections Related to "DOL Litigation"

1. Page 4, line 5-9: *The courts also held IBP liable for unpaid pre-shift and post-shift donning, doffing, and cleaning of special packinghouse industry safety equipment.*

IBP objects that only some equipment was found compensable, and that walking and waiting was found to be not compensable. The Court rejects this objection, as the statement accurately reflects the *Reich* court holding.

2. Page 4-5. Footnote 3: *IBP claimed to have reduced compensable time from 14 minutes to 4 minutes by moving knife distribution and by installing additional equipment washing sinks to reduce waiting time. In late 1998 and early 1999, IBP and DOL negotiated and agreed to 4 minutes of compensation at the non-union plants for pre- and post-shift activities.*

The Court rejects IBP's objection that this mischaracterizes the evidence that the DOL indicated in a stipulation dismissing with prejudice its claims against IBP, that IBP had fully satisfied the DOL.

E. Objections to "Pre- and Post-Shift Activities"

1. Page 6, lines 14-15: *Most Slaughter employees don most of their safety equipment in the locker room.*

The Court rejects IBP's objection that the testimony varied about where employees donned safety equipment. The statement indicates most employees, and the finding was based on adequate representative evidence.

2. Page 6, line 24-26: *Much of the pre-shift routine for processing surrounds the distribution of glove pins with yellow cotton gloves, and protective sleeves and gloves.*

The Court rejects IBP's objection related to the variety of distribution methods. Again, the Court's conclusion was based on adequate representative testimony.

3. Page 7, line 8-9: *A majority of employees do use the restroom during the meal break.*

The Court rejects IBP's objection relating to the adequacy of the representative testimony. Again the Court's conclusion was based on adequate representative testimony.

F. Objections to "Uncompensated Activities"

1. Page 8, line 11-14: *During the 30 minute meal break employees are required to doff and hang up the safety equipment they were wearing before they can begin to use the break as their own time.*

The Court rejects IBP's objection that employees are not required to doff all safety equipment at meal break times, as that is also indicated clearly in the findings.

2. Page 8, line 15-18: *After working on their last piece of meat, the workers are on the production floor and are required to wash their equipment and doff and store their equipment upon returning to their lockers.*

The Court rejects IBP's objection relating to the adequacy of the representative testimony. Again the Court's conclusion was based on adequate representative testimony.

3. Page 9, lines 7-14: *IBP urges that it relied on DOL's exclusion of union plants in this litigation to conclude that clothes changing time was not compensable at union plants . . . (negotiated settlement of 4 minutes clothes changing time).*

The Court rejects IBP's objection that their reliance on DOL includes the *Reich* decision, and that IBP re-engineered their plants to reduce clothes changing time. IBP also objects that referring to the 4 minutes as negotiated implies that it was a compromise of a disputed claim, and that this implication is wrong as this was the reality of how long it took to actually don and doff the protective clothing. The Court rejects these objections as the factual recitation in the Court's

Findings and Conclusions indicates the thrust of IBP's reliance argument at trial and the extra facts relayed by Defendant in this objection are not relevant to the Court's determination that they were not, in fact, relying on DOL. The facts surrounding IBP's claim of reliance are further outlined in the section on Good Faith Reliance.

G. Objections to "Other Claims Re: Noncompensability"

The Court rejects IBP's objections to "Other Claims Re: Noncompensability" as the listed items, arguments by IBP about why certain items are noncompensable, are dealt with elsewhere in the order. The specific arguments listed by IBP in objection are each addressed elsewhere in the Court's proposed Order.

H. Objections to "The Class"

IBP claims there is not a definite class number. The Court is amending the findings to include a total class number of 815, calculated as follows: From Ex. 266-816 opt ins + 5 of the 6 original named Plaintiffs (Pedro Hernandez is #346 on Ex. 266 and should not be counted twice) -5 for five Ex. 266 opt ins stipulated as untimely and -1 Ex. 266 who is double counted (Ms. Hernandez, #'s 338 and 341), for a total of 815 class members.

I. Objections re: Representative Evidence

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the adequacy of the representative evidence. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

J. Objections re: Employer Rebuttal

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the adequacy of IBP's rebuttal of the representational evi-

dence. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

K. Objections re: Statute of Limitation

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions relating to the statute of limitation and willfulness. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

L. Objections re: Overtime Under the FLSA

1. Page 17, line 8-10 *re: 29 C.F.R. § 785.7.*

The Court rejects Defendant's objection that the Court does not indicate that the Portal to Portal Act provides an exception for preliminary and postliminary activities.

M. Objections re: Compensable Time

Defendant's objections under this section, based on their argument that there was not adequate representative evidence for these findings, are rejected by the Court.

The Court rejects IBP's objection relating to the adequacy of the representative testimony. Again, the Court's conclusion was that the representational evidence was adequate.

Item 5, which notes that the Court should include hair net in the list at Page 19, line 5-8, is well taken, and hair net will be added to the list of noncompensable activities as is indicated elsewhere in the Findings and Conclusions.

Item 8, which requests clarification re: polar and clean cut gloves. Plaintiffs concede that polar and clean cut gloves are identical, and the Order will be changed to reflect this.

Item 9, which requests clarification regarding cloth gloves. The Court has determined that two cloth gloves will be

awarded to all processing members, and is not limited to only those Plaintiffs who testified at trial.

Item 10 which requests a "*" by hair net and cloth gloves. The Court will add a "*" by hair net. No such amendment will be made for cloth gloves, as the Court has found these to be "integral and indispensable" and compensable.

Item 11, which requests that it be noted at page 21, footnote 9 that no compensation is required at lunch for boots, safety glasses, hard hat, ear plugs, etc. The Court rejects this request, as the point of the footnote is to indicate what is excluded under 3(o), which does not exclude the time during meal periods.

Items 12-22, which request clarification on recovery for certain items for certain job categories. This is dealt with above on the issue of what will be included in damages calculations.

Item 23, Page 23, line 10-11: *IBP furnishes new gloves to the workers on a weekly basis*. IBP objects that there was no evidence on this. The Court recalls this evidence and testimony and rejects this objection.

N. Objections re: walk and wait time

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding walk and wait time. The Court is not in a posture to reconsider its substantive legal conclusions and will not consider these arguments at this time. Many of these objections are considered in the Plaintiffs' objections and requests for clarifications outlined above.

O. Objections re: Meal Breaks

Defendant's objections regarding meal breaks are addressed in the section regarding Plaintiffs' objections. Again, Defendant objects to the recitation that employees are required to

use the restroom. Again, the Court will not reconsider the adequacy of the representative evidence on this issue.

P. Objections re: Affirmative Defenses

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the adequacy of their affirmative defenses. The Court is not in a posture to reconsider its substantive legal conclusions and will not consider these arguments at this time.

The objections that do not argue legal conclusions are as follows:

1. Page 29, line 4-7. . . *clothes changing is limited to changing into and out of the frock and wash time is limited to washing of the person.*

The Court adopts Defendant's clarification and will include the listed items; hard hat, ear plugs, safety glasses, boots, and hairnet in this excluded category as well.

Q. Objections Re: Portal to Portal

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the Portal to Portal Act. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

Item 2: the Court will add hair net to the items excluded under 3(o).

R. Objections re: "Overtime Claims"

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding overtime claims. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

S. Objections re: Damages

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding damages. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

IBP objects to the Court requiring Plaintiffs to go outside the record to prove damages. This has been addressed in the Court's order striking the Plaintiffs' post-trial declarations.

T. Other Items Not Considered by the Court

1. Four Minutes of Clothing Time Paid Since July 1998.

Plaintiffs indicate that they have given 4 minutes of clothes-changing time credit since July 1998 in their damages calculations. The offset will be expressly referred to in the judgment regarding damages calculations.

2. Form of Judgment

IBP queries whether each individual employee will be a judgment creditor. The Court will enter one judgment, with an overall damages calculation.

3. Occurrence of Simultaneous Activity

IBP argues that many acts are performed simultaneously. The Court adopts Dr. Mericle's findings on the time required for each activity. As the Court's proposed Findings and Conclusions held "[t]he Court acknowledges that there are considerable differences in how and where each employee dons and doffs his or her equipment. Given these differences, the compensable time for each activity is on the basis of a reasonable time, rather than the actual time required for each activity. Evidence of reasonable time was supplied by employee and expert testimony supplied by the Plaintiff, and not rebutted by IBP."

4. Meal Break

IBP requests several clarifications regarding meal-break time, which are addressed above in this order.

5. Preemption

IBP states that the Court does not address federal labor law preemption. This objection is rejected, and the Court refers Defendant to the Proposed Findings at page 28-29. "Union representatives may not bargain away employee rights under the FLSA. *See Featsent v. City of Youngstown*, 70 F.3d 900, 905 (6th Cir. 1995), *citing Walling v. Harnischfeger Corp.*, 325 U.S. 427, 431-32 (1945). The Ninth Circuit has held "that the FLSA's minimum wage and overtime provisions . . . are guarantees to individual workers that may not be waived through collective bargaining." *Albertson's, Inc., v. United Food & Commercial Workers Union, AFL-CIO & CLC*, 157 F.3d 758, 761 (9th Cir. 1998) (*internal quotations omitted*) *citing Locai 246 Utility Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292 (9th Cir 1996) (holding where employees' claim is based on substantive rights under the FLSA, no resort to arbitration under the CBA is required). *See also Collins v. Lobdell*, 188 F.3d 1124, 1127-28 (9th Cir. 1999) (holding congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement). The Supreme Court also has held that FLSA rights "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statue and thwart the legislative policies it was designed to effectuate." *Barrantine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (*citations omitted.*) Conflicting provisions between FLSA and collective bargaining agreements are resolved in favor of the FLSA. *See id.*"

6. Class certification

IBP requests reconsideration of class certification based on the difficulty in calculating damages. Again, this is based on a

misunderstanding of the Court's proposed findings, and an attempt to distort the concept of individualized damages. The Court is requiring individualized damages calculations in an over-abundance of caution to the Defendant. The Court could have determined that the evidence was sufficient to permit a more generalized damages calculation, but because the evidence and testimony permitted a more discrete determination as to timing by job description, equipment list, and activities testified to, the Court determined that this calculation would lead to a recovery that relates to what work was actually performed. Defendant's objection will be denied based on the findings of adequate representative evidence.

IT IS HEREBY ORDERED:

1. Plaintiffs' Objections and Clarifications to the Court's Proposed Findings *(Ct. Rec. 716)* is *GRANTED in part and DENIED in part, as outlined in the above order.*

2. Defendant's Objections and Clarifications to the Court's Proposed Findings *(Ct. Rec. 793)* is *GRANTED in part and DENIED in part as outlined in the above order.*

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 2nd day of August 2001.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 03-1238

IBP, INC.,
Petitioner

v.

GABRIEL ALVAREZ, Individually and on Behalf of All Others Similarly Situated, et al.

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit, No. 02-35042, 02-35110.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Ninth Circuit.

IT IS ORDERED by this Court that the said petition is granted limited to Question 1 presented by the petition. This case is consolidated with No. 04-66 and a total of one hour is allotted for oral argument.

February 22, 2005

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy

(9)

Supreme Court, U.S.
FILED
MAY 16 2005
OFFICE OF THE CLERK

No. 03-1238

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

MICHAEL J. MUELLER
JOEL M. COHN
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
NORINA IRANI EDELMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

May 16, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Under Section 4(a)(1) of the Portal-to-Portal Act of 1947, an employer's obligation to pay wages under the Fair Labor Standards Act of 1938 ("FLSA") does not include time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1).

The question presented is:

(1) Whether walking that occurs between compensable pre- and post-shift clothes-changing and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking . . . to and from the actual place of performance of the principal activity or activities which such employee[s] [are] employed to perform" within the meaning of Section 4(a)(1).

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption except respondents Virginia Alvarez and Maria Chavez. Petitioner notes that IBP, inc., is currently known as Tyson Fresh Meats, Inc.

Pursuant to Supreme Court Rule 29.6, petitioner states that IBP, inc., currently known as Tyson Fresh Meats, Inc., is a subsidiary of Tyson Foods, Inc. (NYSE: TSN).

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IN THE

Supreme Court of the United States

No. 03-1238

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER

OPINIONS BELOW

The order of the court of appeals denying IBP, inc.'s ("IBP") petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003, is unreported, and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 83a-84a. The underlying opinion of the court of appeals was entered on August 5, 2003, is reported at 339 F.3d 894 (9th Cir. 2003), and is reprinted in the Pet. App. at 1a-34a. The findings of fact and conclusions of law of the United States District Court for the Eastern District of Washington were entered on September 14, 2001, are unreported, and are reprinted in the Pet. App. at 35a-82a.

JURISDICTION

The opinion of the court of appeals was entered on August 5, 2003, and the order of the court of appeals denying IBP's petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003. The petition for a writ of certiorari was filed on February 26, 2004, and was granted with respect to the first question presented, on February 22, 2005.[1] J.A. 53. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the following provisions of the Portal-to-Portal Act of 1947: 29 U.S.C. § 254(a)-(b); see also 29 C.F.R. §§ 790.1(b), 790.6(a)-(b), 790.7(c) & (g), 790.8(b)-(c). The pertinent text of these materials is set forth in the appendix hereto at 1a-9a.

INTRODUCTION

This case presents a fundamental question about the compensability of "walking time" under the Portal-to-Portal Act of 1947 ("Portal Act"), which amended the Fair Labor Standards Act of 1938 ("FLSA"). Section 4(a)(1) of the Portal Act excludes from the FLSA's compensation requirements the time employees spend "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1). In the decision below, the Ninth Circuit ruled that Section 4(a) does not apply to such walking time if it occurs between compensable pre- and post-shift clothes-changing and the actual work station. This decision is inconsistent with the text, purpose and history of the Portal Act, this Court's precedent, and the longstanding interpretive guidance of the Department of Labor.

---

[1] This case was consolidated with *Tum* v. *Barber Foods, Inc.* (No. 04-66). J.A. 53.

As this Court has recognized, the Portal Act was a response to the expansive interpretation of the FLSA, and in particular to this Court's rulings that walking time and other ancillary activities were compensable. Congress adopted the Portal Act's walking time provision to cabin that sweeping approach and "with rare exceptions . . . to exclude . . . walking time from compensability." *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 281 (1st Cir. 2004), *cert. granted*, 125 S. Ct. 1295 (2005). By its plain terms, Section 4(a)(1) exempts from compensation the walking that occurs between compensable clothes-changing and the work station. The Department of Labor's longstanding interpretive guidance confirms this plain meaning. See 29 C.F.R. § 790.7(g) n.49. In the decision below, the Ninth Circuit disregarded this clear meaning and adopted an interpretation that produces anomalous results that bear an "uncanny resemblance" to the circumstances that prompted Congress to enact the Portal Act. *Tum*, 360 F.3d at 286 (Boudin, C.J., concurring).

STATEMENT OF THE CASE

A. Statutory Background.

1. In 1938, Congress enacted the FLSA to establish, *inter alia*, employment compensation standards. See 29 U.S.C. §§ 202, 206, 207. Sections 206 and 207 of that Act provide minimum compensation standards for certain employees (who themselves or whose employers) "in any workweek [are] engaged in commerce or in the production of goods for commerce." *Id.* §§ 206, 207. Under the Act, employers must "record, credit, and compensate employees for all of the time which the employer requires or permits employees to work." *Tum*, 360 F.3d at 279. Employers who violate the FLSA's requirements may face liability and liquidated damages. 29 U.S.C. § 216.

The FLSA neither defines the concept of work nor addresses the extent to which work-related walking (or any other ancillary activity) is compensable. This Court adopted a

broad understanding of the notion of work to include "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); see also *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) (extending concept of work even absent physical or mental "exertion" because "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen").

In a trio of cases beginning with *Tennessee Coal*, this Court concluded that travel and walking time that occurred in a variety of work-related settings constituted compensable work time. Thus, in *Tennessee Coal*, the Court held that time iron ore miners spent traveling between the portals of the mine shafts and the working faces of the mine was compensable work under the FLSA. 321 U.S. at 594-98. A year later, in *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945), the Court extended this holding to "underground travel in bituminous coal mines," explaining that compensation was required because "[w]ithout such travel the coal could not be mined," *id.* at 162-66.

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)—"the famous case that launched the Portal-to-Portal legislation," *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1292-93 (D.C. Cir. 1972)—was the culmination of this capacious understanding of compensable collateral work activities. In *Anderson*, the Court adopted a broad definition of "work" that included time spent by pottery plant employees walking to and from their work stations and in ancillary activities before and after their "productive work." 328 U.S. at 682-83. The Court reasoned that compensation was required because, "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and the employees "walked on the

employer's premises only because they were compelled to do so by the necessities of the employer's business." *Id.* at 691. Accordingly, a number of non-production activities—including walking to and from the actual work station—were brought within the ambit of compensable work.

2. In the wake of *Anderson*, there was a "vast flood of litigation" with correspondingly "vast alleged liability." 93 Cong. Rec. 2081, 2087, 2089 (1947); see *id.* at 2082 (citing the "immensity of the [litigation] problem"); S. Rep. No. 80-48, at 3 (1947) (damages totaling "$5,785,204,606" claimed in "portal-to-portal cases" filed within six months after *Anderson*). Congress's response to *Anderson* and the litigation it spawned "was strong and quick, resulting in passage of the []Portal Act at the very next session of Congress less than a year later." *Carter*, 463 F.2d at 1293. As this Court has recognized, the Portal Act "was designed primarily to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* ... would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956) (citation omitted) (quoting 29 U.S.C. § 251(a)). Congress identified a litany of harms linked to an overbroad interpretation of the FLSA, including: financial ruin for employers, gross inequity of competitive conditions and windfall payments to employees. 29 U.S.C. § 251(a).

Of relevance here, Section 4(a) of the Portal Act excludes certain "walking time," as well as unspecified preliminary or postliminary activities, from the compensation requirements of the FLSA.[2] Section 4(a) provides in relevant part that:

---

[2] In addition to the FLSA, the Portal Act also applies to the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*, which governs certain government contracts, and to the Bacon-Davis Act, 40 U.S.C. § 276a *et seq.*, *reclassified at* 40 U.S.C. § 3141 *et seq.*, which governs certain federally financed construction projects, *see* 29 U.S.C. § 254.

> no employer shall be subject to any liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay . . . for . . .
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Id. § 254(a). Section 4(a) thus adopts two definitional rules: a general rule that all unspecified "preliminary" and "postliminary" activities are not compensable work, and the more specific rule that pre- and post-shift walking time is not compensable. Section 4(b) then provides that employers and employees are free to agree to compensation for walking time and any activity within the ambit of 4(a)(2), so long as the parties do so by "an express provision of a written or nonwritten contract," including a collective bargaining agreement, or a relevant "custom or practice." *Id.* § 254(b).

Shortly after the Act was passed, the Department of Labor issued interpretive guidance as to its scope. The Department explained that, even where walking time follows compensable clothes-changing that is "regarded as an integral part of the employee's 'principal activity,'" "[t]his does not necessarily mean, however, that travel between the . . . clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a)[(1)] refers." 29 C.F.R. § 790.7(g) n.49.

B. Factual Background.

IBP, inc., currently known as Tyson Fresh Meats, Inc. (referred to herein as "IBP"), is the world's largest supplier of premium beef and pork, and related products. See Pet. App. 2a. Headquartered in Dakota Dunes, South Dakota, IBP employs approximately 41,000 people across the country. Respondents, workers who were represented during the relevant time by a Teamsters Local Union, are production line employees at IBP's Pasco, Washington meat processing facility.

Although "there are considerable differences in how and where each employee dons and doffs his or her equipment," Pet. App. 54a, employees entering the Pasco facility prior to the beginning of a shift generally walk to their locker room and don various items prior to arrival at their work station; they later doff these items after leaving their work station at the end of the shift. *Id.* at 3a. These items include a sanitary outer garment, a plastic hardhat, a hair net, ear plugs, a face shield, goggles, gloves, liquid-repelling sleeves, apron and leggings, safety boots or shoes, and a weight belt. See *id.* at 4a n.2, 39a-40a. Employees who are "knife users" may wear additional items such as mesh metal aprons, leggings, vests, sleeves, and gloves, as well as plexiglass arm guards and Kevlar gloves. See *id.* at 4a n.2, 40a. Employees must be at their work station on the production line at the time the first product arrives at their station. See *id.* at 3a. Although, for a time, collective-bargaining agreements governing IBP's employees expressly included compensation for "clothes changing" time at the beginning and end of the shift, the agreements negotiated in 1982, 1986, and 1992, as well as the agreement in effect during the period of time at issue in the proceedings below, excluded "clothes changing time." *Id.* at 4a n.3, 37a-38a.

C. Proceedings Below.

1. In 1998, respondents filed a class action suit against IBP in the United States District Court for the Eastern District of Washington charging that certain of IBP's compensation practices violated the FLSA. Subsequently, a class was certified consisting of certain "'IBP processing or slaughtering division employees at [IBP]'s Pasco, Washington plant from June 30, 1995 to [August 24, 1999].'" Pet. App. 45a (alteration in original).

Of relevance here, respondents sought pay under the FLSA for reasonable time spent walking to their work stations after retrieving their work attire at their locker before the beginning of the work shifts, and time spent walking from their work stations before doffing that attire after the end of the work shifts.[3] Petitioner defended its practices, *inter alia*, on the grounds that Section 4(a)(1) of the Portal Act excludes from the FLSA's compensation requirements the time spent by employees walking between their work stations and the places where they pick up and return their clothes.

2. After a bench trial, the district court determined that the donning and doffing of certain of the attire detailed above was compensable and ruled for respondents on the compensability of related walking time. See Pet. App. 35a-82a. Specifically, the district court ruled that the donning and doffing of protective gear are "integral and indispensable to" the employees' work.[4] It thus held that the donning of such

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[3] Respondents' complaint and the opinions below addressed several other FLSA and State law issues that are not before the Court.

[4] Although the district court found that the donning and doffing of certain "non-unique protective" clothing (such as "hard hats, earplugs, frocks, safety goggles, a hair net, and boots") was "work," it held that the donning and doffing of this clothing was "not integral and indispensable to the job" and was, in any event, non-compensable because the time involved was *de minimis* as a matter of law. Pet. App. 54a & n.6. These issues are not before the Court.

gear was the start of the employees' work day, which "begins with commencement of an employee's principal activity," and that the doffing of such gear marked "the completion of the employee's activity," or work day. *Id.* at 54a. The district court then concluded that "reasonable walking time from the locker to workstation and back ... is compensable for employees required to don and doff compensable" clothing "as it occurs during the 'work day.'" *Id.*

Respondents' time-study expert, Dr. Kenneth Mericle, calculated that the "average time" for walking between the locker and the work station was 1.653 minutes for processing employees and 0.962 minutes for "kill" (slaughter) employees, Pet. App. 50a, 55a, 57a, and the district court found that this was a "reasonable amount of time required to perform" the walking at issue. *Id.* at 56a. For processing workers who retrieve compensable clothing at their lockers, then walk from the locker area to the cafeteria to obtain gloves (which most processing workers do), the district court awarded an additional 1.061 minutes of time for walking, for a total of 2.714 minutes before the work shift. See *id.* at 57a, 59a. With respect to glove wearers who do not wear other compensable gear (because the changing time for such items was excluded as *de minimis*), however, the court awarded no compensation for walking from the locker to the cafeteria. J.A. 39-40.

3. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court in relevant part. The Ninth Circuit held that respondents' donning and doffing of both "non-unique gear (e.g., hardhats) and unique gear (e.g., Kevlar gloves)" are "'integral and indispensable' to Pasco's 'principal' activity" and therefore generally compensable. Pet. App. 12a-14a. It found, however, that the "donning and doffing of non-unique protective gear such as hardhats and safety goggles is noncompensable as *de minimis*." *Id.* at 14a.

As to walking time, the court held that this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), "compels th[e]

conclusion" that, because respondents' donning and doffing is an integral and indispensable preliminary activity "'embrace[d]'" by respondents' principal work activity, "[a]ll activities performed thereafter—such as 'walking'—thus occur during the 'principal' workday and are compensable." Pet. App. 18a-19a (alteration in original) (quoting 350 U.S. at 252-53). The court rejected petitioner's argument that Section 4(a)(1) of the Portal Act makes clear that the walking time at issue here is not compensable even if it follows compensable clothes-changing. The lower court reasoned that, because "[p]laintiffs were required to obtain their protective gear from their lockers and to be present at their work stations as the first piece of meat arrived," intervening walking time also is compensable because respondents "obviously could not have worked without walking between these places." *Id.* at 19a. Acknowledging that the First Circuit had reached a contrary conclusion, the Ninth Circuit reasoned that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Id.* at 19a & n.10.

On February 26, 2004, IBP filed a petition for a writ of certiorari, which was granted on February 22, 2005, limited to the first question presented. J.A. 53.

SUMMARY OF ARGUMENT

The Ninth Circuit's interpretation of the Portal Act "pushes so far that it threatens to undermine" a primary purpose of that Act: excluding pre- and post-shift walking time from mandatory compensation. *Tum*, 360 F.3d 281. Not only can the holding below not be reconciled with the relevant statutory text, Congress's plain purpose in enacting the Act, or the Department of Labor's longstanding interpretive guidance, but also it would lead to a series of anomalous results. Accordingly, the Ninth Circuit's walking time holding should be reversed.

By its plain terms, the Portal Act defines pre- and post-shift walking as an activity that is not mandatorily compensable under the FLSA, leaving employees and employers free to determine the compensability of such time by contract, custom or practice. Specifically, the Act provides that "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is not subject to mandatory compensation. 29 U.S.C. § 254(a)(1). Here, the "principal activity" respondents are hired to perform is indisputably meat processing, not clothes-changing, and the "actual place of performance" of this activity is the meat-processing work station, not the locker rooms or cafeteria where employees retrieve or don and doff their work gear. Accordingly, the pre- and post-shift time that respondents spend walking to and from the work stations where they actually process meat falls squarely within the scope of Section 4(a)(1) and is therefore not subject to the mandatory compensation requirements of the FLSA.

The Ninth Circuit ignored the plain meaning of subsection (a)(1), however, based on a clear misunderstanding of this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). *Steiner* concluded that certain integral and indispensable clothes-changing and showering falls outside the scope of subsection (a)(2), which provides that unspecified "preliminary" and "postliminary" activities are not subject to mandatory compensation under the FLSA. *Steiner* nowhere purported to determine when the "workday" commences, or to address the compensability of any pre- and post-shift walking that immediately follows compensable clothes-donning or immediately precedes compensable doffing. Indeed, the Court in *Steiner* expressly stated that its analysis of subsection (a)(2) does not apply to pre- and post-shift activities that are "specifically excluded by Section 4(a)(1)." *Id.* at 256. Thus, *Steiner* does not "compel" the conclusion that, once any integral and indispensable clothes-changing

occurs, the compensable workday automatically begins even though the employees have not yet arrived at their actual work stations.

The history and purpose of the Portal Act confirm that pre- and post-shift walking time is not compensable, and that *Steiner* cannot be read to override Section 4(a)(1)'s clear language when such walking time immediately follows or precedes compensable clothes-changing. The walking time provision was enacted to undo this Court's pre-Portal Act precedent, which provided broad compensation for pre- and post-shift walking time, and to ensure that pre- and post-shift walking time is outside the scope of mandatory FLSA compensation. In enacting this categorical exclusion for walking time, Congress was fully aware that some pre- and post-shift walking could occur immediately after or before compensable clothes-changing. Moreover, the *Steiner* Court was fully aware that Congress had adopted subsection (a)(1) to repudiate its walking time decisions. It is inconceivable that, in a case involving the scope of subsection (a)(2), this Court would have purported to alter the scope of subsection (a)(1), without a word of acknowledgment that it was doing so.

The Department of Labor's longtime interpretive guidance, drafted shortly after the passage of the Portal Act, confirms subsection (a)(1)'s plain meaning. The agency expressly acknowledges that, even where clothes-changing is considered integral to the principal activity, and therefore compensable, intervening travel "between the ... clothes-changing place and the actual place of performance of the specific work the employee is employed to perform" may still be governed by subsection (a)(1). 29 C.F.R. § 790.7(g) n.49.

The Ninth Circuit's approach also should be rejected because it leads to the kind of anomalous results that prompted Congress to enact the Portal Act. For example, the artificial notion of the workday adopted by the court below would result in compensation for pre- and post-shift walking

depending on the fortuity of where the first item of compensable gear is stored, rather than concerns of efficiency or convenience. Employees with differences in where their compensable gear is retrieved would experience disparate compensation that, in turn, complicates time-keeping for employers and creates dissatisfaction among employees. By dramatically decreasing the applicability of the walking time exclusion—despite clear evidence that Section 4(a)(1) is an absolute bar to mandatory compensation for pre- and post-shift walking time—the Ninth Circuit's approach causes the very harms that prompted passage of the Portal Act: financial strain on employers facing newfound liabilities; "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; and, as labor costs increase, an increase in the cost of goods and services to all consumers, including the government. 29 U.S.C. § 251(a).

ARGUMENT

I. THE TIME EMPLOYEES SPEND WALKING BETWEEN COMPENSABLE CLOTHES-CHANGING AND THEIR ACTUAL WORK STATIONS IS NOT COMPENSABLE UNDER SECTION 4(a) OF THE PORTAL ACT.

The text, purpose and history of Section 4 of the Portal Act demonstrate that the time employees spend walking between compensable pre- and post-shift clothes-changing and their actual work stations is not subject to mandatory compensation under the FLSA, unless made compensable by contract (such as a collective-bargaining agreement), custom or practice.

A. The Text Of Section 4(a)(1) Of The Portal Act Makes Clear That The Walking Time At Issue Here Is Not Compensable.

Although the Ninth Circuit gave no serious consideration to the text of Section 4(a)(1), see Pet. App. 18a-19a, "[i]t is

elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); *accord Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). The text of Section 4(a)(1) demonstrates that time spent walking between the place where compensable clothes are obtained and an employee's actual work station is not mandatorily compensable.

Under Section 4(a), employers are not required to provide compensation under the FLSA for an employee's:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a).[5]

Because Congress did not define the terms used in Section 4, courts must "look to the ordinary meaning of these terms," *Rousey* v. *Jacoway*, —U.S.—, 125 S. Ct. 1561, 1568 (2005);

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[5] The remainder of Section 4(a) has no relevance here. It was added by the Small Business Job Protection Act of 1996 "to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles." S. Rep. No. 104-281, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1474.

see also *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). As the Court has explained, the term "'principal'" typically means "'most important, consequential, or influential.'" *Commissioner* v. *Soliman*, 506 U.S. 168, 174 (1993) (quoting *Webster's Third New International Dictionary* 1802 (1971)). Thus, an employee's "principal activity" is the most important or consequential task (or tasks) the employee was hired to accomplish. As applicable here, the "principal activity" respondents are "employed to perform" is processing meat, not changing clothes.

Section 4(a)(1) expressly excludes from mandatory compensation the time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1). The phrase "actual place of performance" necessarily refers to the place where the employee performs the important or consequential task (or tasks) he or she "is employed to perform." See, *e.g.*, *Carter*, 463 F.2d at 1294 (the "'actual place of performance'" of locomotive operators' principal activity "is the locomotive itself," not the assignment board that engineers had to check each day before walking to their assigned locomotive); *Ralph* v. *Tidewater Constr. Corp.*, 361 F.2d 806, 808-09 (4th Cir. 1966) (for employees building the Chesapeake Bay bridge, "actual place of performance" was the bridge itself, not the dock where employees boarded a boat for daily ride to and from their work sites). Here, the "actual place" where respondents perform their "principal activity" of processing meat is the work station where they engage in such processing—not the locker room or cafeteria where they retrieve the clothes they must wear at their work stations.

Finally, the walking time at issue here occurs "prior to the time on any particular workday at which such employee

commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). As just noted, the relevant walking takes place before each respondent "commences," or after each respondent "ceases," his or her "principal activity" of processing meat. Thus, by its plain terms, Section 4(a)(1) exempts from compensation the time that respondents spend walking to and from their work stations. On this basis alone, the decision below should be reversed.[6]

B. Nothing In This Court's Decision In *Steiner* Justifies Departing From The Plain Meaning Of Section 4(a)(1).

Rather than apply Section 4(a)(1) in accordance with its plain meaning, the Ninth Circuit ruled that this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), "compels" the conclusion that the "workday commence[s] with the performance of a preliminary activity that [is] 'integral and indispensable' to the [employee's] work," and that "any activity occurring thereafter in the scope and course of employment [is] compensable." Pet. App. 18a. *Steiner*, however, neither compels nor even justifies any deviation from the plain meaning of Section 4(a)(1). Indeed, *Steiner* addressed the meaning of subsection (a)(2), and expressly reaffirmed that subsection (a)(1) excludes pre- and post-shift walking time from the FLSA's compensation requirements.

The issue in *Steiner* was whether battery plant employees who worked with "dangerously caustic and toxic materials" were entitled to compensation for time spent changing clothes

[6] Where, as here, statutory terms are unambiguous, "judicial inquiry is complete, except in rare and exceptional circumstances." *Garcia* v. *United States*, 469 U.S. 70, 75 (1984) (internal quotation omitted); *see United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.").

"before . . . the direct or productive labor for which [they were] primarily paid," 350 U.S. at 248, and for "shower[ing] and chang[ing] back at the end of [the productive work] period." *Id.* at 251. The employer argued that the time spent on such activities was expressly excluded from the FLSA's compensation requirements by Section 4(a)(2), which excludes "activities which are preliminary to or postliminary to" the employees' principal activity. This Court rejected that argument, concluding

> that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act *if* [1] those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and* [2] are not specifically excluded by Section 4(a)(1).

Id. at 256 (emphases added).[7]

Contrary to the Ninth Circuit's view, *Steiner* does not purport to determine when the "workday" commences, nor does it hold that all activities that occur after an integral and indispensable activity are compensable. This Court held only that activities that are "integral and indispensable" to the employees' "principal activity" are themselves compensable, and therefore outside the scope of subsection (a)(2), which generally renders "preliminary" and "postliminary" activities non-compensable except by agreement. The Court thus ruled

[7] The Court reiterated this construction in *Steiner*'s sister case, *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), in observing that in:

> *Steiner*, . . . we concluded that . . . activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] *if* [1] those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and* [2] are not specifically excluded by Section 4(a)(1).

Id. at 261 (holding that knife sharpening is a compensable "principal" activity of butchers in meatpacking plant) (emphases added).

that the employees were to be compensated for the 30 minutes they spent changing clothes and showering each day, *id.* at 251; it nowhere held that the time employees spent walking between the locker room where these activities occurred and the production line was also compensable. See *Tum*, 360 F.3d at 281 n.5 ("*Steiner* concerned only time spent in the donning and doffing of special protective equipment and in required protective showers. *Steiner* did not purport to say that all time walking to where that equipment is stored, waiting to retrieve and return it, and then walking to the time clock is compensable.").

Despite the narrowness of *Steiner*'s actual holding, the Ninth Circuit read the decision as (1) equating "integral and indispensable" activities with "principal activities," (2) thereby implicitly holding that an employee's first "integral and indispensable" activity triggers the start of the workday, (3) and thus placing any pre- and post-shift walking time that occurs immediately after the first, or immediately before the last, integral and indispensable activity entirely outside the scope of subsection (a)(1). Each link in this daisy chain of reasoning is mistaken. First, the Court could have simply held that the clothes-changing at issue in *Steiner* was in fact the employees' first "principal activity," if that is what the Court believed. By instead employing the concept of an "integral and indispensable" activity—a concept that does not appear in Section 4(a) itself—the Court necessarily recognized that the clothes-changing was not itself a principal activity.

Second, if *Steiner* had equated "integral and indispensable" activities with principal activities, it would have had to confront the obvious and awkward implications that such an interpretation raised. As noted above, Section 4(a) does not simply refer to "principal activities," but rather to "principal activities" that "commence[]" and "cease[]" at an "actual place of performance" for such activities. 29 U.S.C. § 254(a). If clothes-changing were the "principal activity" that started

the workday, the *Steiner* Court would have been forced to decide either (1) that an activity could be an employee's "principal activity" even though it occurred in a locker room and not on "the production line," 350 U.S. at 251-52, where "the production of batteries, the 'principal activity' in which these employees were engaged," *id.* at 249, took place, or (2) that the locker room, and not the production line, was the "actual place of performance" of the employees' principal activity. The fact that *Steiner* did not grapple with either of these issues confirms that it was simply deciding the scope of non-compensable "preliminary" and "postliminary" activities under subsection (a)(2), and not re-defining the phrase "principal activity" in a manner that would also alter the scope of subsection (a)(1).

Third, *Steiner* explicitly confirmed that its interpretation of subsection (a)(2) did *not* affect the scope or applicability of subsection (a)(1). The Court stated that activities performed "before or after the regular work shift" are mandatorily compensable only if they are "an integral and indispensable part of the principal activities" that the employees were hired to perform "*and are not specifically excluded by Section 4(a)(1).*" *Id.* at 256 (emphasis added). Thus, the *Steiner* Court recognized that Section 4(a)(1) continues to place pre- and post-shift walking time outside the FLSA's mandatory compensation requirements even when such walking occurs between other pre- and post-shift activities that are subject to mandatory compensation.[8]

Finally, the Ninth Circuit's reading of *Steiner* fails to recognize that Section 4 of the Portal Act is not itself the source of affirmative obligations. The Ninth Circuit read

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[8] In effect, the Ninth Circuit read *Steiner* as though it stated that pre- and post-shift activities are compensable if they are (1) integral and indispensable to a principal activity *or* (2) occur after the first and before the last such integral and indispensable activity. That is manifestly not what this Court held.

Steiner as determining the content of a statutorily-specified event (first "principal activity") that serves as a trigger for statutory liability for the compensable "workday." But this is not the nature or structure of Section 4(a). As petitioner explains in greater detail below, Section 4(a) was enacted to override this Court's construction of compensable "work." Section 4(a) does this by adopting a general definitional rule—that unspecified pre- and post-shift activities (*i.e.*, "preliminary" and "postliminary" activities) are not mandatorily compensable work—and a more specific rule—that pre- and post-shift walking time is not mandatorily compensable work. In light of this structure, it is clear that this Court's conclusion that integral and indispensable clothes-changing falls outside the scope of the general rule simply means that such clothes-changing is mandatorily compensable work. That conclusion says nothing about the compensability of *other* pre- and post-shift activities, such as walking. And that is precisely why this Court cited subsection (a)(1) in its final holding in *Steiner*: to emphasize that its clarification of the scope of one of the Act's general definitional rules did not detract from the need to address the applicability of the Act's other definitional rule when deciding the compensability of pre- and post-shift activities.

In sum, *Steiner* certainly does not compel this Court to ignore or override the plain language of Section 4(a)(1). The Court should therefore apply Section 4(a)(1) in accordance with its plain terms, and hold that respondents' walking time is not subject to mandatory compensation under the FLSA.

C. The History And Purpose Of The Portal Act Confirm That The Walking Time At Issue Here Is Not Compensable.

The history and purpose of the Portal Act amply confirm that Section 4(a)(1) applies to walking time that follows compensable clothes-donning (or precedes compensable clothes-doffing). See generally *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (plurality

opinion) ("[t]he purpose of Congress is the ultimate touchstone" of statutory interpretation) (internal quotation omitted). That history shows that Congress intended *all* pre- and post-shift walking to be uncompensated except pursuant to contract, custom or practice. Moreover, because it was universally recognized that Congress adopted the Portal Act to overturn this Court's prior interpretations of the FLSA, it is inconceivable that, in *Steiner*, this Court would have altered the scope of Section 4(a)(1)—a provision expressly designed to overrule the Court's previous walking and travel time decisions—without even a single word of acknowledgment that it was doing so.

1. The Portal Act Superseded This Court's Interpretations Of The FLSA, Including The Court's Conclusion That Walking And Travel Time Are Compensable.

A proper understanding of Congress's purpose in enacting the Portal Act necessarily begins with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)—"the famous case that launched the Portal-to-Portal legislation," *Carter*, 463 F.2d at 1292-93. In *Anderson*, the Court ruled that "the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace" and, thus, that "the time spent in these activities must be accorded appropriate compensation." 328 U.S. at 690-91. Under this ruling, employees were entitled to compensation for the "30 seconds" to "8 minutes" of walking time from the plant entrance "to their respective places of work" prior to "the start of productive work," as well as for "various preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, [and] putting on finger cots." *Id.* at 682-83, 690. The Court reasoned that this walking time was compensable because, "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and the

employees "walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business" *Id.* at 691.[9]

Anderson followed other cases in which the Court took an equally broad view of mandatorily compensable work. In *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), the Court observed that work is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 598. This reasoning rendered travel time compensable, requiring compensation for underground travel between the portals of mine shafts and the working faces of mines. See *id.* at 594-98; *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945). Compensation was due, this Court reasoned, because "[w]ithout such travel the coal could not be mined," *id.* at 162-66; thus, this travel time "partakes of the very essence of work," *id.* at 170.

Not only did these cases "contradict[] actual pay practice within the industries and create[] large overhanging liabilities for employers," *Tum*, 360 F.3d at 284 (Boudin, C.J., concurring), but also they prompted a "vast flood of litigation" involving "vast alleged liability," 93 Cong. Rec. at 2087, 2089; *id.* at 2082 (noting the "immensity of the [litigation] problem"). Congress found that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and

[9] The Court also recognized a "*de minimis*" exception to an employer's obligation to provide compensation under the FLSA. *See Anderson*, 328 U.S. at 692 ("We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible," such as "[w]hen the matter in issue," *i.e.*, walking time after punching time clocks, "concerns only a few seconds or minutes of work beyond the scheduled working hours . . . ."). As noted above, certain of respondents' donning and doffing activities are noncompensable as *de minimis*. Pet. App. 13a-14a, 54a & n.6.

employees, thereby creating wholly unexpected liabilities, immense in amount." 29 U.S.C. § 251(a). Congress further found that, if the courts continued to interpret the FLSA so broadly, numerous harms would befall the national economy including: "financial ruin of many employers" and "serious[] impair[ment of] the capital resources of many others"; "gross inequity of competitive conditions between employers and between industries"; "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; and the cost of goods and services to the government "be[ing] unreasonably increased," including "serious[]" increases in the "cost of war contracts." *Id.*

Congress's response was notably "strong and quick, resulting in passage of the Portal-to-Portal Act at the very next session of Congress less than a year" after the *Anderson* decision. *Carter*, 463 F.2d at 1293. Congress acted "to remedy what were deemed to be some harsh results of [the Court's] decision in *Anderson* . . . , which held that time necessarily spent by employees walking to work on the employer's premises and in preliminary activities after arriving at their places of work was working time within the scope of the [FLSA]." *Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 61 (1953); *accord Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 780 (1981) ("Portal-to-Portal Act. . . . was intended to curtail the numerous suits for unpaid compensation and liquidated damages under the FLSA that were filed after this Court's decision in *Anderson*").

The congressional record is replete with references to cabining *Anderson*'s broad approach. For example, the Senate Report states that the Portal Act was meant to render activities, "such as the preliminary activities which were involved in the [*Anderson*] case," subjects of bargaining, not

statutory mandates. S. Rep. No. 80-48, at 47.[10] Likewise, Senator Cooper, a sponsor of the Portal Act, stated that, in cases such as *Anderson*, "the courts went too far," in that "activities were held to be compensable when logically and equitably there should be no compensation [for such] activities." 93 Cong. Rec. 2287, 2296 (1947) (statement of Sen. Cooper). Indeed, Senator Cooper referred to *Anderson*'s ruling that employees be paid for walking to their place of productive work as one of the most extreme aspects of that decision: "the [*Anderson*] case further extended that doctrine, by holding that under certain circumstances other activities—even walking time—might be considered compensable." *Id.* at 2293 (statement of Sen. Cooper); see also H.R. Rep. No. 80-71 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1029, 1030 (Portal Act responded to *Anderson*'s holding that "time spent in walking on the employer's premises to the work station and time spent in certain preliminary and incidental activities must be included in the compensable workweek").

The clear purpose of Section 4(a)(1), therefore, was to make a fundamental shift away from *Anderson*, by ensuring that pre- and post-shift walking and travel time is outside the scope of mandatory FLSA compensation. Thus, Senator Cooper explained that "clearly and definitely, as to the future, an employee cannot receive compensation for *any* walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. at 2297 (statement of Sen. Cooper) (emphasis added). Likewise, the Senate Report makes plain that Section 4(a)(1) would relieve an "employer from liability for travel time from the portal of

[10] *See Garcia*, 469 U.S. at 76 (treating Committee Reports as "'authoritative'" guide to legislative intent). In the case of the Portal Act, *Steiner* found the floor debates—and particularly statements by the Act's sponsors—to be especially relevant. 350 U.S. at 254. Further, because the enacted version of Section 4 followed the Senate bill, the Senate history generally is considered "more persuasive" than the House debate. *Id.*

a mine to its face unless such time is compensable by contract or by a practice or custom." S. Rep. No. 80-48, at 48.

Moreover, the evolution of Section 4(a)(1)'s language underscores that Congress did not intend the walking time at issue here to be compensable. An early proposal simply referred to walking to and from the "actual place of work of the employee." *A Bill to Exempt Employers From Liability for Portal-to-Portal Wages in Certain Cases, and for Other Purposes: Hearings on S. 70 Before a Subcommittee of the Committee on the Judiciary*, 80th Cong. 655 (1947) (hereinafter, "Judiciary Committee Hearing"). Participants at a Senate Judiciary Committee hearing expressed the view that the phrase "actual place of work" meant "the place at which [the employee] goes to work. . . . [I]t does not mean the gate, it does not mean the premises, it does not mean the clock. It means the place at which the [employee] goes to work," *id.* at 656 (statement of Mr. Pettit), where an employee "begins his activities at some prescribed hour," *id.* (statement of Sen. Cooper), or "some prescribed place," *id.* (statement of Mr. Pettit).

In response, Senator Cooper expressed concern that the "actual place of work" language would not go far enough or be clear enough to capture the intended concept: "If that is not defined in some way, the actual place of work, according to the Jewell decision would be at the portal [of the mine shaft], and you would be back where we started." *Id.* (statement of Sen. Cooper).[11] Accordingly, Senator Cooper suggested that the legislation include additional language

[11] Ironically, in response to this concern, the hearing witness expressed doubt that:

> any court would say that legislation enacted for the purpose of getting rid of walking time, which provided that 'walking time' should not be deemed time worked under the act, until you reached your actual place of work, that the court would turn around and say that that started where the [employee] starts walking.

Judiciary Committee Hearing, *supra*, at 657 (statement of Mr. Pettit).

further defining the "actual place of work," such as "that place where the scheduled hours of work begin." *Id.* at 657. Following these discussions, the language was changed to "the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1).

2. The Portal Act's Purpose And History Foreclose The Ninth Circuit's Reading Of Both Section 4(a)(1) And *Steiner*.

The purpose and history of the Portal Act foreclose any claim that Congress mandated compensation for walking that follows compensable clothes-donning or precedes compensable clothes-doffing.

Fundamentally, the Ninth Circuit's core rationale—that the walking time at issue here is compensable because employees "obviously could not have worked without walking between" the place where they retrieve compensable clothing and their actual work station, Pet. App. 19a—bears a close resemblance to the root logic of *Anderson*, namely, that pre- and post-shift walking time is compensable because "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved," 328 U.S. at 691. But, by enacting the Portal Act, Congress decisively rejected this capacious understanding of mandatorily compensable pre- and post-shift walking time.

Numerous statements by the Act's sponsors and in the legislative reports reveal unmistakably an intent to exclude from the FLSA's compensation requirements any and all walking to and from the actual place where employees perform the principal activities for which they are employed. Indeed, the Senate Report states expressly that the Act precludes mandatory compensation for:

> [w]alking, riding, or traveling to and from the actual place of performance of the [employee's] principal activity or activities within the employer's plant, mine,

> building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out.

S. Rep. No. 80-48, at 47.

Moreover, at the time they categorically stated that such walking time is excluded, the members of Congress and the Senate Judiciary Committee were fully aware that walking could occur between compensable clothes-changing and the place where employees perform their principal tasks. Because the earliest drafts of the Act provided that employers were not relieved of liability with respect to an activity made compensable by contract, custom or practice,[12] Senator Cooper and other members of the Senate Judiciary Committee necessarily understood that walking could occur in circumstances comparable to those presented here—*i.e.*, after clothes-donning or before clothes-doffing that was compensable by virtue of a contract, custom or practice (rather than, as here, a finding of indispensability). Yet Senator Cooper and the Committee repeatedly stated that "an employee *cannot* receive compensation for *any* walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. at 2297 (statement of Sen. Cooper) (emphasis added); see S. Rep. No.

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[12] *See* Judiciary Committee Hearing, *supra*, at 4 (defining "work" as "'only those activities of an employee . . . which are specifically paid for as such by his employer, either pursuant to practice or custom at the plant or other specified place where such employee is employed, or pursuant to the express provisions of an agreement at the time in effect between such employer and such employee, his agent, or collective bargaining representative'"); *id.* at 6-8 (reprinting H.R. 584, which provides that "[n]o action, whether or not commenced prior to the effective date of this Act, shall be maintained, to the extent such action is . . . based upon failure of an employer to pay an employee for activities heretofore or hereafter engaged in by such employee other than those activities which at the time of such failure were specifically required to be paid for either by custom or practice . . . or by express agreement").

80-48, at 47 (walking time excluded "irrespective of" when it occurs).

In fact, Senator Cooper recognized that clothes-changing could be compensable precisely because it was deemed integral to an employee's principal activity. Indeed, it was his floor statement that *Steiner* cited in support of its holding. See 350 U.S. at 254 & n.5; *id.* at 258. He undoubtedly knew that walking could immediately follow or precede such compensable clothes-changing, yet stated categorically that all walking time was excluded from the FLSA's compensation requirements. See 93 Cong. Rec. at 2297. In explaining the basis for this categorical rule, moreover, Senator Cooper rejected the rationale of the Ninth Circuit below. That court reasoned that integral and indispensable donning and subsequent walking are "embraced" by respondent's principal activity and therefore are compensable. But, Senator Cooper explained that "*[w]alking*, riding, or traveling time to the place where the principal activities are performed *has been eliminated as a principal activity.*" *Id.* (statement of Sen. Cooper) (emphasis added).

The purpose and history of the Act also render the Ninth Circuit's interpretation of *Steiner* utterly implausible. It is indisputable that the Act was adopted to reverse a number of this Court's interpretations of the FLSA—particularly its ruling concerning walking time. Indeed, as noted, just three years before *Steiner*, this Court acknowledged that Congress acted "to remedy what were deemed to be some harsh results of [the Court's] decision in *Anderson* . . . , which held that time necessarily spent by employees walking to work on the employer's premises . . . was working time within the scope of the [FLSA]." *Unexcelled Chem. Corp.*, 345 U.S. at 61; see also *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 523 n.1 (1950) (Congress found that "*Anderson* . . . misconceived the purposes of Congress.") (Frankfurter, J., dissenting). Yet, as the Ninth Circuit interprets it, *Steiner* effectively overrode this congressional judgment in a wide range of circumstances,

by ruling that a principal activity necessarily embraces all indispensable clothes-donning and all reasonable subsequent time spent walking to the actual place of work.

There is simply no basis for assuming that this Court disregarded Congress's will. *Steiner* is firmly grounded in congressional intent (as ascertained by the methodology of the time); the Court explicitly based its ruling on the Act's legislative history and, in particular, on the colloquy in which Senator Cooper explained that employees were to be compensated for clothes-changing where they "could not perform [their principal] activity without putting on certain clothes." 350 U.S. app. at 258; *id.* at 254 & n.5 (citing same to show that "the Senate intended the activities of changing clothes and showering to be within the protection of the Act if they are" integral and indispensable to the principal activity). Given *Steiner*'s fealty to congressional intent, its complete failure to mention compensation for related walking time, and its express *caveat* that pre- and post-shift activities were not mandatorily compensable if they were "specifically excluded by Section 4(a)(1)," *id.* at 256, *Steiner*'s holding is properly understood to require mandatory compensation *only* for the time actually devoted to "integral and indispensable" clothes-changing and showering.[13] *Steiner* cannot properly be understood as re-instating, *sub silentio*, its earlier—and congressionally repudiated—understanding of compensable pre- and post-shift walking time whenever such walking is related to other pre-and post-shift activities that are compensable.

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[13] In fact, the clear import of the colloquy *Steiner* cited is that the compensation due is for the actual time spent changing clothes. *See* 350 U.S. app. at 258 (citing statement of Sen. Cooper that "the time used *in changing into those clothes* would be compensable") (emphasis added).

D. Agency Interpretive Guidance Buttresses The Conclusion That Walking Time Is Not Mandatorily Compensable.

The Department of Labor's longtime interpretive guidance further supports the conclusion that the walking time at issue here is not subject to mandatory compensation under the FLSA.

Shortly after enactment of the Portal Act in 1947, the Wage and Hour Division of the Department of Labor issued interpretive guidance "to outline and explain the major provisions of the Portal Act" and "to indicate the effect of the Portal Act upon the future administration and enforcement" of the FLSA. 29 C.F.R. § 790.1(b). Although the Department "has no authority to promulgate legislative rules in this area," *Tum*, 360 F.3d at 281,[14] as noted in *Steiner*, in amending the FLSA in 1949, Congress stated that the Secretary of Labor's then-existing interpretative guidance—including the provisions cited herein—"'shall remain in effect as an ... interpretation'" of the Portal Act. 350 U.S. at 255 & n.8 (quoting 29 U.S.C. § 208 note (former Section 16(c)).

Most notably, the Department acknowledged that, even if "the changing of clothes may in certain circumstances be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity,'" and therefore compensable:

> [t]his does not necessarily mean, however, that travel between the ... clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[14] Indeed, all of Subchapter B of the Secretary's interpretive guidance, *see* 29 C.F.R. §§ 775.0-794.144, is entitled "Statements Of General Policy Or Interpretation Not Directly Related To Regulations."

29 C.F.R. § 790.7(g) n.49 (citing colloquy between Senators McGrath and Cooper). Like this Court's decision in *Steiner*—which also relied extensively on colloquies between Senators McGrath and Cooper—the Department's adoption of this explanation makes clear that a compensable "integral and indispensable" activity does not render compensable all time spent walking between that activity and the actual work station. See *Tum*, 360 F.3d at 280 (relying on this provision to reach a result contrary to that of the court below).

Furthermore, the Department's interpretive regulations confirm the role that the "actual place of performance" language plays in establishing the boundaries of the walking time provision. See 29 C.F.R. § 790.7(c) (walking time "to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do"). The regulations provide that the "workday" is the period "'from whistle to whistle,'" *id.* § 790.6(a), such that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there," *id.* § 790.6(b). Here, respondents must be at their work station on the production line at the time the first product arrives at their work station. See Pet. App. 3a. Accordingly, the "whistle to whistle" in this case runs from the time respondents must arrive at their work stations until the time they finally leave those posts at the end of the shift.

Thus, the interpretive regulations—adopted shortly after passage of the Portal Act and subsequently ratified by Congress—reflect the understanding that, while certain pre- and post-shift activities may be so integral to an employee's work that they are compensable, see *id.* § 790.8(b)-(c), this does not override the bounds of Section 4(a)(1). Accordingly, the time an employee spends walking "to and from the actual place of performance of the principal activity or activities

which [an] employee is employed to perform," 29 U.S.C. § 254(a)(1), is not mandatorily compensable simply because it immediately follows compensable clothes-donning, or immediately precedes compensable doffing. A contrary rule that renders walking time compensable whenever it is related to pre- and post-shift activities deemed compensable under *Steiner* would create a vast loophole in Section 4(a)(1)'s categorical treatment of walking time and be irreconcilable with its text.

II. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 4(a)(1) LEADS TO ANOMALOUS RESULTS AND THE KIND OF HARMS THE PORTAL ACT WAS DESIGNED TO AVOID.

The Ninth Circuit's reading of Section 4(a)(1) also should be rejected because it would lead to anomalous results and recreate the very kinds of problems that prompted passage of the Portal Act in the first place. See *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 202-03 (2000) (courts should avoid interpretations that "create anomalous results" in light of the "practical consequences").

A. The Ninth Circuit's Interpretation Of Section 4(a)(1) Leads To A Host Of Anomalous Results.

As the First Circuit pointed out, an "automatic rule that any activity that satisfies the 'integral and indispensable' test itself starts the workday" "would lead to [] absurd result[s]." *Tum*, 360 F.3d at 280.

Chief among these absurdities is that compensation for walking time would depend on the fortuity of where compensable gear happens to be located. Thus,

> a worker who picks up and puts on a required [compensable clothing item] at the plant entrance—an activity integral to a principal activity under *Steiner* (as extended by the lower courts)—then must be compensated for everything else that happens (*e.g.*, walking and waiting to pick up more equipment, walking to the time clock at the production floor entrance, waiting to punch in).

Id. at 285 (Boudin, C.J., concurring). By contrast, an employee at the same hypothetical facility who obtains and dons that item at the work station would receive no compensation for pre-shift walking time, even though the exertion from the employee's perspective would be identical.[15] Accordingly, employers can seek to avoid or minimize compensable walking time "by placing all of the items at one location instead of at a few locations" or by placing changing locations closer to work stations. *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003). But these decisions would be driven not by a legitimate concern for efficiency, but by an artificial effort to avoid liability for walking time Congress never intended to make compensable. Thus, whether walking is compensable would depend on the chance of where employees retrieve their compensable gear.

Similarly, the district court's ruling has incongruously disparate effects on two groups of workers: those whose only compensable item of clothing is gloves and those who wear gloves and other compensable items of clothing. Gloves are not stored in lockers, but rather are laundered daily and distributed in the cafeteria. See Pet. App. 59a; J.A. 39-40. As to processing employees whose only compensable gear is gloves, the district court did not award compensation for the walk from the locker to the cafeteria (1.061 minutes), but rather only for the general walk to the work station (1.653

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[15] Analogously, the *Anderson* Court recognized the problem of fortuity with respect to compensating employees based on when they get in line to clock-in. Because all employees cannot punch-in simultaneously, "[t]he first person in line at the clock would be checked in at least 8 minutes before the last person." 328 U.S. at 690. In such a case, "[i]t would be manifestly unfair to credit the first person with 8 minutes more walking time than credited to the last person due to the fortuitous circumstances of his position in line." *Id.*

minutes). See Pet. App. 57a; J.A. 39-40.[16] Accordingly, as between two employees whose lockers are side by side, an employee who stores just one compensable item in his locker will receive 64 percent more compensable walking time (2.714 minutes, instead of 1.653 minutes) even if the two employees walk together to the cafeteria to pick up their gloves. See *id.*

Nor is this the only incongruously disparate effect of the Ninth Circuit's rule. Although many employees begin their day at a supply room picking up certain supplies, see Pet. App. 40a-41a, the whites and the frocks that are retrieved there daily are not compensable items, see *id.* at 56a & n.9. Thus, the district court did not award walking time from that point, but rather only from the point that an employee arrives at his or her locker (for employees who store compensable items there). See *id.* at 54a, 60a. But, the district court found "considerable differences" in how and where employees donned their clothing. *Id.* at 54a. As the employees testified at trial, many went to their locker first to obtain a hard hat and/or other items before going to the supply window. See Trial Tr. at 266:8-25 (docket 1000), 427:15-428:2 (docket 1001), 591:17-592:6 (docket 1003), 856:19-857:20 (docket 1005). As a result of the rulings below, such employees effectively are compensated for traversing the distance between the locker room and the supply window, even if picking up only non-compensable items at the supply window, whereas walking the same distance in the reverse order is not compensable even if employees pick up compensable items at the supply window.

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[16] Although the 1.061 minutes is listed in the "kill" column of the district court's order, Pet. App. 57a, there is no dispute that this time, in fact, refers to "processing" employees, *see* J.A. 39-40. Nor is there any dispute that other walking time numbers in the district court's order, *see* Pet. App. 57a (1.091 minutes for "kill" workers and 1.352 minutes for processing workers), relate exclusively to the meal period and were removed by the Court in its order on objections, *see* J.A. 39-40.

The Ninth Circuit's holding also ignores that integral and indispensable make-ready time will often be relatively brief. As the First Circuit pointed out, the Ninth Circuit's approach "may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal." *Tum*, 360 F.3d at 284. In practice, walking time will frequently, and perhaps usually, take more time than the supposed triggering events. Thus, the mere fact that an employee engages in a few minutes of integral and indispensable preliminary or postliminary activities would, under the Ninth Circuit's approach, result in many more minutes of compensation for walking that the employees otherwise would do *without* compensation.

For example, in this case, under the opinions below, employees who store in their locker only items for which they are not entitled to compensable clothes-changing time (such as safety glasses, hard hat, ear plugs and/or hair net) are not considered to have commenced work at their locker. See Pet. App. 54a & n.6, 56a-57a & n.9 (asterisked items), 60a. But, according to the Ninth Circuit, the addition of a single "compensable" item to the locker commences the work day and renders compensable walking that takes place thereafter. Thus, by merely adding a plexiglass armguard to the locker, which takes .091 minutes (*i.e.*, 5½ seconds) to don, an employee would be compensated for the subsequent walking time. That walking time is nearly three minutes for a processing division employee who walks from the locker to the cafeteria to get gloves (1.061 minutes) and then to the work station (1.653 minutes). See *id.* at 57a. This result, mandated by the Ninth Circuit, means that two employees whose lockers are side by side and walk the same distance to their work stations would be compensated differently

depending on whether one of them had a single compensable item among the gear in his or her locker.[17]

The legislative history makes clear that the Portal Act was designed to eliminate, not foster, such illogical and unfair discrepancies. See S. Rep. No. 80-48, at 40. As the Senate Report noted, in pre-Portal Act lawsuits, individual workers sought compensation for their own individualized walking time involving "countless individual judgments for amounts that will vary from worker to worker"; the Report also concluded that "[t]he possibilities for dissatisfaction between employees in such a situation are very great. Those who receive amounts smaller than are received by their fellow workers are likely to be disgruntled in many instances. The net effect could well be very unsettling upon labor peace and productivity." *Id.*

Moreover, the Ninth Circuit, disagreeing with the district court, found that all of the items at issue in the case are "'integral and indispensable,'" Pet. App. 12a-13a, but did not alter the district court's finding, *id.* at 56a-57a & n.9 (items marked with asterisk), that six of these items are excluded

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[17] It is no answer to any of these discrepancies and incongruities to argue that they can be resolved through litigation over the reasonableness of walking time or compensable gear location. The complex record-keeping associated with such efforts is itself something the Portal Act was designed to spare employers. During Senate debates, Senator Donnell, one of the Senate Managers involved in the Conference Report, explained that,

> when an employer has neither a contract nor a custom under which his employee was to be entitled to compensation for walking time, *it is not fair or just to require the employer to keep records upon such a maze of details as would be necessary in order to keep track of how far each employee walked*, or how long it took each employee to tape his arms, or raise the window, or grease his arms, or don his overalls, or whatever the case may be.

93 Cong. Rec. 2254 (Mar. 18, 1947) (emphasis added).

from compensation by virtue of 29 U.S.C. § 203(*o*),[18] see Pet. App. 14a-17a. The Ninth Circuit's analysis therefore produces the following discordant result in situations where non-*de minimis*, indispensable clothes-changing is indisputably excluded from compensation by Section 3(*o*): donning or doffing such clothes would not constitute "hours worked" under Section 3(*o*), but would trigger compensation requirements for related walking time. It is bizarre that a non-compensable act could trigger the compensability of acts that follow (and that otherwise are not themselves compensable). But this is the logical—though absurd—effect of Section 3(*o*) upon "integral and indispensable" donning if that term is simply equated with "principal" activity.

B. These Anomalies Cannot Be Justified On The Ground That The "Workday" Commences With The First Integral And Indispensable Act.

None of the foregoing anomalies and incongruities is justified by the Ninth Circuit's belief that an integral and indispensable act necessarily commences the workday. Pet. App. 19a.

As petitioner has shown, *Steiner* neither held, nor compelled the conclusion, that integral and indispensable clothes-changing commences the "workday" and renders all post-donning or pre-doffing walking time mandatorily compensable. See *supra*, § I.B-C. Nor is it true, as the Ninth Circuit asserted, that once compensable activities are commenced, they may not thereafter be "stopped while the

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[18] Section 3(*o*) provides, in relevant part:

> [i]n determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes . . . at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(*o*).

employee is walking to his station, then recommenced when the walking is done." Pet. App. 19a. In fact, the Department of Labor's interpretive regulations lead to precisely this conclusion and affirmatively reject the very rule the Ninth Circuit adopted. See *supra*, § I.D.[19]

The Ninth Circuit's logic also fails on its own terms. It ruled that, once commenced, the workday cannot be stopped and re-started because work time is "continuous, not the sum of discrete periods." Pet. App. 19a. But it upheld a judgment that compensated respondents only for the "*reasonable*" time they spent walking to and from the work station before and after their shifts. Thus, contrary to its own stated rationale, the lower court's judgment effectively does permit the workday to start (with compensable clothes-changing) then stop (at the end of any reasonable period for walking, if workers take a longer amount of time to reach their stations), then re-commence (at the work station). As a result, the judgment effectively does provide compensation for "discrete periods," and is therefore flatly inconsistent with the notion, embodied in the regulation the lower court cited, *id.* at 18a, that the workday actually commences with the first integral and indispensable act, since employees must be paid for all time "within that [workday] whether or not the employee engages in work throughout all of that period." 29 C.F.R. § 790.6(b).

In short, the Ninth Circuit's rule that the workday commences with the first integral and indispensable activity is neither compelled nor justified by the notion that compensable time must be continuous in nature. And the incongruities and anomalies that such a rule spawns are more than sufficient to demonstrate that, although compensable,

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[19] The Department's espousal, in recent litigation, of an "automatic rule that any activity that satisfies the 'integral and indispensable' test itself starts the workday, regardless of context," *Tum*, 360 F.3d at 280, is flatly inconsistent with its longstanding interpretive guidance.

integral and indispensable activities cannot be equated with "principal activities" for purposes of determining when the compensable workday begins. Indeed, as the First Circuit explained, the Ninth Circuit's misconception in this regard "threatens to undermine" the primary purpose of the Portal Act: excluding walking time from mandatory compensation. *Tum*, 360 F.3d 281. As in this case, interpretations of Section 4(a)(2) will, under the Ninth Circuit's rule, dramatically narrow the applicability of the walking time exclusion, despite clear evidence that Section 4(a)(1) is an absolute prohibition on compensation for pre- and post-shift walking time. That narrowing, in turn, can lead to enormous liabilities, causing the very harms that prompted passage of the Portal Act: financial strain on employers facing newfound liabilities; "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; and, as labor costs increase, an increase in the cost of goods and services to all consumer, including the government. 29 U.S.C. § 251(a).

Congress made clear that employers and employees can agree to compensation for pre- and post-shift walking by contract, custom or practice. Congress made equally clear, however, that courts may not award compensation for such time in the absence of such an agreement. The Ninth Circuit has done serious violence to the plain language of Section 4(a)(1) and the purposes that motivated Congress to treat walking time as non-compensable except pursuant to agreement, and its reasons for doing so do not withstand scrutiny. If any expansion of compensation for walking time is to be adopted, "the proper venue for resolving that issue remains the floor of Congress." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 (1998).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

MICHAEL J. MUELLER
JOEL M. COHN
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
NORINA IRANI EDELMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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APPENDICES

APPENDIX A

29 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act [41 U.S.C. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * *

APPENDIX B

29 C.F.R. § 790.1. Introductory statement.

* * * *

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

* * * *

29 C.F.R. § 790.6. Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by

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[3] Sections 790.23 through 790.29 in the prior edition of this Part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with

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[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in Part 785 of this chapter.

this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[57] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[58] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

[57] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[58] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

29 C.F.R. § 790.7. "Preliminary" and "postliminary" activities.

* * * *

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which Section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one

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[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Cong. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act.[46]

* * * *

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

* * * *

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[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in Part 785 of this chapter.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. § 790.8. "Principal" activities.

* * * *

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

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[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

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preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

Nos. 03-1238 & 04-66

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IN THE

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IBP, INC.,

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v.

GABRIEL ALVAREZ, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

ABDELA TUM, *et al.*,

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v.

BARBER FOODS, INC., D/B/A/ BARBER FOODS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN TUM V. BARBER FOODS (No. 04-66) AND IN SUPPORT OF RESPONDENTS IN IBP V. ALVAREZ (No. 03-1238)

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 58 national and international labor organizations with a total membership of approximately 13 million working men and women, files

this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

These two cases were brought by employees of meatpacking industry employers claiming overtime wages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 20 *et seq*. for the time the employees spent in donning and doffing required personal protective equipment and sanitary garb and for the time spent walking from the plant's donning locations to the plant's killing or cutting floor and from the killing and cutting floors to the plant's doffing locations.

"[M]eatpacking is one of the most dangerous industries in the United States." GAO-05-96, "Safety and Health of Meat and Poultry Workers," pp. 1 & 7 (Jan. 12, 2005), available at: http://www.gao.gov/new.items/d0596.pdf ("GAO Rep."). In order to ameliorate these dangers, meat and poultry processing employees (hereinafter meat processing employees) are required to don an array of personal protective equipment at their plant before the employees proceed to the plant's killing cutting floor. *See* 29 C.F.R. § 1910.32 (a) (OSHA standard requiring "personal protective equipment . . . . wherever it is necessary by reason of hazards of processes or environment"). Virtually all such employees are required to don personal protective equipment such as hard hats, safety goggles or face shields, earplugs, back belts, steel-toed boots, and vinyl aprons and gloves. *IBP v. Alvarez* (No. 03-1328), Pet. App. 4a n. 2 & 39a; *Tum v. Barber Foods* (No. 04-66), Pet. App. 3a-4a & 23a-25a. In addition, the employees who handle knives or other sharp implements are required to don a variety of equipment made of chain-linked metal, including

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

mesh aprons, leggings, vests, sleeves and gloves. *Alvarez* Pet. App. 4a n. 2 & 39a-40a.[2]

Meatpacking also implicates the public health, requiring that the slaughtering and butchering take place in sanitary conditions. All meat processing employees are therefore required by U.S. Department of Agriculture regulations to don a variety of sanitary garb, most particularly sanitary hair nets and smocks at the plant before the employees proceed to the plant's killing or cutting floor. *See* 9 C.F.R. § 416.5. *Alvarez* Pet. App. 39a; *Tum* Pet. App. 23a.

Much of the personal protective equipment must be stored, donned and doffed at the plant. *Alvarez* Pet. App. 3a-4a, 39a; *Tum* Pet. App. 4a. Many of the items must be cleaned at the plant of animal blood and fat at the end of the workday in order to be made ready for future use; the items made of chain-linked metal are, in any event, too unwieldy to be worn away from the plant. *Alvarez* Pet. App. 3a, 41a-42a.

All of the sanitary garb is maintained by the meatpacking employer; is provided by the employer to the meat processing employees and then donned at the plant; and is doffed at the plant and returned to the employer at the end of the workday. *Alvarez* Pet. App. 39a-40a; *Tum* Pet. App. 25a. USDA regulations require that meat processing employees don clean sanitary garb at the start of each day and that the garb be maintained in a sanitary condition throughout the day. 9 C.F.R. § 416.5(b). The employees are generally required to remove their sanitary garb before leaving the killing or cut-

[2] The *Tum* case presents the somewhat atypical situation of a secondary poultry processing plant where boneless chicken breasts are dressed and packaged for shipment to retail outlets. *Tum* Pet. App. 21a. For the more typical situation of a plant where live chickens are slaughtered and butchered, see pages 5-9 of the Magistrate Judge's Report and Recommendation (Feb. 14, 2001) in *M.H. Fox, et al. v. Tyson Foods, Inc.*, Case No. CV-99-TMP-1612-M (N.D. Ala.), available at https://ecf.alnd.uscourts.gov/ cgi-bin/DktRpt.pl?84138.

ting floor and to re-don the garb again when they return to the floor. *Alvarez* Pet. App. 5a, 41a; *Tum* Pet. App. 28a.

SUMMARY OF ARGUMENT

I. The question common to both the *Alvarez* case and the *Tum* case is whether § 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), privileges the employers here to treat their employees "post-donning-of-required-personal-protective-equipment-and-sanitary-garb" walking time from the plant's donning locations to the plant's killing or cutting floor and the employees' "pre-doffing" walking time from the killing or cutting floor to the plant's doffing locations, as noncompensable under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. The answer to that question is "no."

The Portal-to-Portal Act embodies Congress' judgment: (i) that the employer's noncompensation privilege stated in § 4(a) is to apply only to employee activities that take place either *prior to the commencement* of the employee's "workday" or *subsequent to the conclusion* of that "workday;" and (ii) that this § 4(a) employer noncompensation privilege is *not* to apply to employee activity during the "workday" proper. Section 4(a) so states in clear and unambiguous statutory language; § 4(a)'s legislative history, moreover, makes it plain that what § 4(a) statutory language so clearly states is what Congress intended it to state; and the Department of Labor's Portal-to-Portal Act regulations interpret § 4(a) in strict accord with its plain meaning and with the legislative history materials.

This Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956), in its turn, teaches that the employees here "commence [their] principal activity or activities," §4(a),—and thus begin their workday—when, at the beginning of their shift, the employees engage in the activity at employer-designated plant locations, of donning the personal protective equipment and sanitary garb the employer requires them to don and that the employees "cease [their] principal activity or activities"—and thus conclude their workday—when, at the end of their shift, they engage in the activity of doffing that required personal protective equipment and sanitary garb at the plant's doffing locations. That being so, the Portal-to-Portal Act does not apply to any of the employees' post-donning/pre-doffing walking activities at the plant—whether it be walking between the plant's donning locations and the plant's killing or cutting floor, walking between places on the killing or cutting floor, or walking between the plant's killing or cutting floor and the plant's doffing locations.

II. The *Tum* case presents the Portal-to-Portal Act question of whether § 4(a) privileges the employer to treat the waiting time spent by its poultry processing employees in obtaining required personal protective equipment and sanitary garb from the employer, and in returning that equipment and garb, in the course of their workplace donning ad doffing activities, as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."

This Court's decision in *Steiner v. Mitchell*, *supra*, establishes that the FLSA makes compensable "time incident" to an employee workplace activity, like the clothes changing there, that is "an integral and indispensable part of the principle activity for which the covered workmen are employed," *see* 350 U.S. at 248 and 256; *viz*. makes compensable the time the employee spends taking the steps necessary to accomplishing that work-place activity task. And, the employee waiting time in obtaining and returning required personal protective equipment and sanitary garb at issue in *Tum* like the time the employee spends in taking physical possession of the required items and in the physical return of those items is part and parcel of a single necessary step toward accomplishing their workplace donning and doffing activity task. That waiting time is thus compensable "time incident" to that employee workplace activity.

ARGUMENT

I. THE "POST-DONNING AND PRE-DOFFING WALKING TIME" ISSUE

In both *Alvarez* and *Tum*, the meatpacking employer: (i) requires its meat processing employees, at the beginning of their shift, to procure and don particular personal protective equipment and sanitary garb at specified plant donning locations; (ii) requires the fully outfitted employees to walk directly from the plant's donning locations to the plant's killing or cutting floor; (iii) requires the fully outfitted employees at the end of their shift to walk from the killing or cutting floor to the plant's doffing locations; and (iv) requires the employees to doff and turn in the personal protective equipment and sanitary garb that must be cleaned for future use at those doffing locations.

The question common to both cases is whether § 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), privileges the employers to treat the employees post-donning walking time and the pre-doffing walking time at issue here as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."[3]

The Portal-to-Portal Act states—in clear and unambiguous language—Congress' carefully considered judgment: (i) that the employer's noncompensation privilege stated in § 4(a) applies only to employee activities that take place either *prior to the commencement* of the employee's "workday" or *subsequent to the conclusion* of that "workday;" and (ii) that the § 4(a) employer noncompensation privilege does *not* apply to employee activity during the "workday" proper. Section 4(a),

[3] The *Tum* case also raises a § 4(a) question regarding the compensability of the waiting time the employees spend in the course of donning and doffing this required personal protective equipment and sanitary garb at the plant. We treat briefly with that question in Part II of our argument, *infra*.

by its terms, has no application to employee activities that occur during the period of time that begins when an employee "commences" his "principal activity or activities" on a given day and that continues until the employee "ceases" his "principal activity or activities" for that day. 29 U.S.C. § 254(a).

This Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956), makes it equally clear that the meat processing employees here "commence [their] principal activity or activities"—and thus begin their "workday"—when, at the beginning of their shift, the employees engage in the activity, at employer-designated plant locations, of donning the personal protective equipment and sanitary garb the employer requires them to don and that the employees "cease [their] principal activity or activities"—and thus conclude their "workday"—when at the conclusion of their shift they engage in the activity of doffing that required personal protective equipment and sanitary garb at the plant's doffing locations. That being so, the Portal-to-Portal Act does not apply to any of the employees' post-donning/pre-doffing walking activities at the plant—whether it be walking between the plant's donning location and the plant's killing or cutting floor, walking between places on the killing or cutting floor, or walking between the plant's killing or cutting floor and the plant's doffing locations.

A.(1) Section 4(a) of the Portal-to-Portal Act provides that

> "no employer shall be subject to any liability or punishment under the Fair Labor Standards Act . . . on account of the failure of such employer . . . to pay an employee overtime compensation, for or on account of any of the following activities . . .—
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254 (a).

In sum, the express terms of § 4(a)(1) privilege employers to treat as noncompensable under the FLSA an employee's "activities [of] . . . walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform . . . which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

This statutory text clearly and unambiguously states the following two points with regard to § 4(a)(1)'s scope of application:

- First, § 4(a)(1) *does* privilege employers to treat as noncompensable under the FLSA: (i) employee "walking, riding, or traveling to the . . . [first] actual place of performance of the [employee's] principal activity or activities" at the beginning of the employee's "workday," and (ii) employee "walking, riding, or traveling . . . from the [last such] place of performance" at the end of the employee's "workday."

- Second, § 4(a)(1) does *not* privilege employers to treat as noncompensable under the FLSA, employee "walking, riding, or traveling" between one "actual place of performance of the [employee's] principal activity or activities" and a second "place of [such] performance" which "occurs [subsequent] to the time on any particular workday at which such employee commences [and prior] to the time on any particular workday at which he ceases, such principal activity or activities."

(2) The Portal-to-Portal Act's legislative history makes it plain that what § 4(a)(1) says in this regard is precisely what Congress intended to say. The Senate Report on the provision in the Senate bill that became § 4(a) states:

> "The rule laid down [in § 4(a)] is that activities which take place either prior to the time at the beginning of his workday when [an] employee commences, or subsequent to the time at the end of his workday, when [an] employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith." Senate Report No. 48, 80th Cong., 1st Sess. 47 (1947).

In this regard, the Senate Report explains that it "uses the term 'workday' to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform." *Id.*

The Senate Report goes on to note that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof," and reiterates that "the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[] the beginning and the end of his workday." S. Rep. No. 48, p. 48.

To leave no doubt about § 4(a)'s scope of application, the Senate Report, having described what is *within* § 4(a)'s limited reach, describes what is *beyond* § 4(a)'s reach: "Activities of an employee which take place during the workday are . . . not affected by this section and such activities will continue to be compensable or not without regard to the provisions of this section." S. Rep. No. 48, p. 47. And, it follows that "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accor-

dance with the existing provisions of the Fair Labor Standards Act." *Id.* at 48

Each of the Senate bill's primary sponsors re-emphasized the limits of § 4(a)'s reach during the ensuing floor debate:

> • Senator Wiley, who submitted the Report on the Senate bill, explained that "activities occurring within the 'whistle-to-whistle' period are not affected by the Senate bill. Such activities are permitted to be treated as they have been, under the Fair Labor Standards Act." 93 Cong. Rec. 2084 (1947).
>
> • Senator Donnell, the Senate bill's floor manager, stated that "we are not undertaking to legislate in [this section] as to the workday proper; but we are legislating solely with respect to the preliminary activities, before the beginning of the workday, and the postliminary activities, after the conclusion of the workday." *Id.* at 2181.
>
> • Senator Cooper, the third principal sponsor of the bill, explained, "For the period from the beginning of the time of the employee's principal activity, until that principal activity is ended, we do not legislate at all. That area is still under the Wage and Hour Administrator. The rules which have already been developed by the Wage and Hour Administrator and the decisions of the courts still apply to that interval between the commencement of the employee's principal activity and the end thereof." *Id.* at 2297.

Consistent with the foregoing, in presenting to the Senate the conference agreements on the portal-to-portal bill, Senator Wiley reported:

> "Section 4 of the conference agreements relates to future claims and relieves an employer from liability for his failure to pay minimum wages or overtime compensation for activities engaged in outside of the workday, unless such activities are compensable by custom or contract. Activities performed by an employee during the workday are not affected in any manner by this bill, and the employer will remain liable or not liable for payment of such activities under the [FLSA] to the same extent as he would be if this bill were not enacted. In other words, they are left under the applicab[le] provisions of law in existence prior to the date of enactment of the Portal-to-Portal Act of 1947." 93 Cong. Rec. 4269.

See also id. at 4388 (where Rep. Gwynne gives a similar explanation of the conference agreements to the House).

In sum, as Senator Wiley put it, "[a]ctivities performed by an employee during the workday are not affected in any manner by [§ 4(a)]," 93 Cong. Rec. 4269, and as the Senate Report explained, the statutory term "workday" is defined "to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform," S. Rep. No. 48, p. 47.

(3) The regulations adopted by the Department of Labor shortly after the enactment of the Portal-to-Portal Act succinctly state the lessons to be drawn from the statutory language and its legislative history.

First, those regulations clearly state that "[p]eriods within the 'workday' [are] unaffected" by the Portal-to-Portal Act:

> "Section 4 of the Portal Act does not affect the computation of hours worked within the 'workday' proper, roughly described as the period 'from whistle to whistle,' and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before 'preliminary' or 'postliminary' activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday

at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the 'workday' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the 'workday' in activities of the kind described in section 4." 29 C.F.R. § 790.6(a) (footnotes omitted).

Second, the regulations clearly elaborate the definition of the term "workday" in the Portal-to-Portal Act as follows:

> "'Workday' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the 'workday,' and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked." 29 C.F.R. § 790.6(b) (footnotes omitted).

Finally, after stating that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity," the regulations explain that "[a]mong the activities included as an integral part of a principal activity are those

closely related activities which are indispensable to its performance." 29 C.F.R. § 790.8(b) & (c) (footnotes omitted).[4]

(4) Against that background, the sum and substance of § 4(a)(1), as Senator Cooper explained, is to provide that "[w]alking, riding, or traveling time to the place where the principal activities are performed [is] eliminated as a principal activity" so that "clearly and definitely, as to the future, an employee cannot receive compensation [pursuant to the

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[4] Contrary to the First Circuit's suggestions at *Tum* Pet. App. 8a-9a, nothing in the Department of Labor regulations departs from, limits or modifies the regulations' recognition, 29 C.F.R. § 790 6(a), that "periods within the 'workday' [are] unaffected" by the Portal-to-Portal Act. As the Secretary of Labor stated in her *amicus* brief to the First Circuit in support of rehearing in *Tum*, the Department of Labor regulations "adhere to the 'workday' principle" throughout and none of the subsections cited by the First Circuit in its *Tum* opinion, are intended to call for, or can be properly read as calling for, the application of § 4(a) to make noncompensable any employees activity that occurs during the employee's "workday" proper. See Brief For the Secretary of Labor As Amicus Curiae Supporting Petition For Panel Rehearing And Petition For Rehearing En Banc in *Tum v. Barber Foods*, 1st Circuit Nos. 02-1679 & 02-1739, at pp. 7-8 and 10-12.

The Secretary pointed out in this regard that 29 C.F.R. 790.7(q) n.49 "stands for nothing more remarkable than the proposition that the [employee workplace] travel discussed *may* be noncompensable if the [employees'] preceding activity at the washroom or the clothes-changing place is, under the particular circumstances, not considered a principal activity. Sec. Br. at 10-11. The Secretary added that 29 C.F.R. 790.7(d) "does not address employees who must walk *after* performing their first principal activity . . . [but] only describes those situations when commuting time independently would or would not be considered a compensable principal activity, thereby starting the workday" Sec. Br. at 11-12 (emphasis in original). And, the Secretary noted that 29 C.F.R.790.7(g) and 790.8(c) treat with "activities that *normally* or *ordinarily* would not be considered principal active-ties, and thus would be considered "preliminary" or "postliminary" in nature (i.e., outside the purview of the "workday"), Sec. Br. at 12 (emphasis in original).

The Secretary of Labor's interpretation of her own regulation is, of course, entitled to the greatest weight.

FLSA] for any walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. 2297. In other words, as the Court stated in *Steiner v. Mitchell*, *supra*, employee "activities . . . are compensable under the portal-to-portal provisions . . . if those activities are an integral and indispensable part of the [employee's] principal activities . . . and are not [the 'walking, riding, or traveling' activities] specifically excluded [from the term 'principal activity or activities'] by Section 4(a)(1)." 350 U.S. at 256.

Congress' point in providing in § 4(a)(1) that "an employee cannot receive compensation [pursuant to the FLSA] for any walking, riding, or traveling time to the actual place of performance where he begins his actual activities," 93 Cong. Rec. 2297 (Sen. Cooper), was to preclude any argument that walking at the start of the day to the place where an employee performs the first of his "principal activities" is so integral and indispensable to the employee's ability to perform that first activity that the walking itself must be regarded as a "principal activity."

If "walking, riding, or traveling" at the start of the day to the place where an employee performs the first of his "principal activities" had not been singled out in § 4(a)(1) as not being a "principal activity," this argument would have had force. This is so because the Portal-to-Portal Act defines "principal activity or activities" as including "closely related activities which are indispensable to [a principal activity's] performance." But this argument would have resurrected in a new guise the holding in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946), that "time necessarily spent by the employees in walking to work on the employer's premises, following the punching of time clocks, was working time within the scope of [FLSA] § 7(a)." And, since a primary purpose of the Portal-to-Portal Act was to overrule *Mt. Clemens Pottery* with respect to "walking to work," the

language of § 4(a) was drafted so as to clearly and definitely put that argument to rest and to do so in a manner that makes it plain that § 4(a)(1), like § 4(a)(2), has no application to employee workplace activity that occurs during the employee's "workday" proper.

(5) In *Alvarez*, the petitioner-employer argues that, in § 4(a)(1), Congress went far beyond overruling the "walking to work" holding of *Mt. Clemens Pottery* and instead made noncompensable under the FLSA employee "walking that occurs *between* [the place of performance of an] 'integral and indispensable activity' and the work station." Pet. 13 (emphasis added). This reading of § 4(a)(1) runs roughshod over the language that Congress crafted and enacted to make it clear that the provision is to have *no* application to employee activity during the "workday" proper.

Section 4(a)(1) simply can*not* be read to say that employers are privileged to treat as noncompensable under the FLSA employee "walking, riding, or traveling" during the course of the workday *between* "place[s] of performance of . . . principal . . . activities." What § 4(a)(1)'s language does say, and what Congress intended it to say, is that employers are so privileged with regard to employee "walking, riding, or traveling *to* . . . the [first] actual place of performance of the employee's] principal activity or activities" at the beginning of the workday and "*from*" the last such place at the end of the workday, 29 U.S.C. § 254(a)(1) (emphasis added). Nothing in § 4(a)(1) provides any predicate for the proposition that the provision applies to "walking, riding, or traveling" during the "workday" proper.

By the same token, the *Alvarez* petitioner-employer's effort to rest its reading of § 4(a)(1) on the *Steiner* opinion runs roughshod over that opinion's language.

As we have noted, *Steiner* defines the § 4(a) term "principal activity or activities"—and thus the range of activities compensable under the FLSA—as follows:

> "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." 350 U.S. at 256.

The *Alvarez* petitioner-employer would read the foregoing not as an elucidation of the meaning of the § 4(a) term "principal activity or activities" but as an elucidation of the term "walking, riding or traveling" and as if the *Steiner* Court had stated:

> "activities performed [during an employee's workday] . . . are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the [employee's] principal activities . . . and are not [the walking, riding, or traveling] specifically excluded [from being compensable] by Section 4(a)(1)."

That rendering of the *Steiner* opinion has nothing to do with the opinion the *Steiner* Court wrote. It restates what the Court said so as to put the opinion into direct conflict with § 4(a)(1)'s statutory language and with the Congressional intent clearly expressed in § 4(a)(1)'s language to make noncompensable *only* employee "walking, riding, or traveling to . . . the [first] actual place of performance of the principal activity or activities" at the beginning of the "workday" and "from" the last such place at the end of the "workday" and not employee workplace "walking, riding or traveling" during the "workday" proper.

B. As we have emphasized, § 4(a)'s statutory language states in clear terms that its provisions have no application to

employee activity during the "workday" proper—the period of time that begins when an employee "commences" his "principal activity or activities" and continues until the employee "ceases" his "principal activity or activities"

In contrast, "[t]he language of Section 4 is not free from ambiguity," *Steiner*, 350 U.S. at 254, with regard to what employee activities come within the statutory term "principal activity or activities."

But *Steiner* and its companion case, *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956), fill out the meaning of that statutory term and do so in a manner that clearly establishes that the meat processing employees here are engaged in their "principal activity or activities" when they engage in the workplace donning of their required personal protective equipment and sanitary garb and when they engage in the workplace doffing of that equipment and garb.

(1) The "precise [Portal-to-Portal Act] question" in *Steiner* was:

> "[W]hether workers in a battery plant must be paid as a part of their 'principal' activities for the time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in [plant] facilities which state law requires their employer to provide." 350 U.S. at 248.

The Court answered that question "yes." Based on the language of § 4(a) read in the context of the Portal-to-Portal Act as a whole and its legislative history, the Court

> "conclude[d] that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities

for which covered workmen are employed and are not specifically excluded by Section 4(a)(1).

We find no difficulty in fitting the facts of this case to that conclusion because it would be difficult to conjure up an instance where changing clothes and showing are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." 350 U.S. at 256.

(2) While *Steiner* speaks clearly for itself, we would be derelict if we failed to note two aspects of the Senate legislative materials the *Steiner* Court set out in the appendix to its opinion as providing particular support for its statement "that the Senate intended the activities of changing clothes and showering to be within the protection of the [Fair Labor Standards] Act if they are an integral part of and are essential to the principal activities of the employees," 350 U.S. at 254, and for the Court's holding.

First, elaborating on the Senate Report's explanation that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof," S. Rep. No. 48, p. 48, Senator Cooper stated "it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity." 93 Cong. Rec. 2297.

Seeking clarification as to the definition of this critical statutory term, Senator McGrath asked Senator Cooper:

> "Am I correct in understanding the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?" 93 Cong. Rec. 2297.

Senator Cooper then confirmed Senator McGrath's understanding. *Id.* at 2297-98.

See Steiner, 350 U.S. at 256-257.

Second, in their colloquy Senators Cooper and McGrath made it clear that the term "principal activity or activities" covers employee activities indispensable to the employee's performance that take a short time as well as those that take a longer time. In this regard Senator Cooper began by reciting two examples of "principal activities" from the Senate Report. The second example involved "a garment worker . . . who is required to report 30 minutes before other employees" and during that time "distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees." This prompted the following series of questions and answers:

> "Mr. McGrath. Is there any significance to the use of the words 'thirty minutes'? * * *
>
> "Mr. Cooper. No; there was no definite purpose in using the words 'thirty minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes.
>
> "Mr. McGrath. Then we can clear that point up by reiterating that what the committee means is that any amount of time spent in the performance of the type of activity expressed in examples 1 and 2 is to be hereafter regarded as compensable time.
>
> "Mr. Cooper. I should certainly say so, as a part of the principal activity." 93 Cong. Rec. 2298.

See Steiner, 350 U.S. at 257-258 (omitting the two next to last portions in this exchange).

(3) *Steiner's* holding formed the predicate for the Court's companion decision in *Mitchell* v. *King Packing Co.*, *supra*, which concerned "knifemen [who] perform[ed] various butchering operations . . . in the killing room and . . . in the cutting room" of "an interstate meat packer" who "[we]re required to sharpen their own knives outside [i.e. before or after] the scheduled shift of eight hours . . . in a room [in the plant]

equipped by [their employer for that purpose] . . ." 350 U.S. at 262.

The Portal-to-Portal Act question in *King* was "whether the knife-sharpening activities of the employees . . . are within the[] classification" of "principal activities," as defined in *Steiner*. 350 U.S. at 262. The Court answered that question "yes."

Noting that "[a]ll of the knives . . . must be 'razor sharp' for the proper performance of the work," 350 U.S. at 262, the Court concluded that "the knifesharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed and that they must be compensated for by [the employer] in compliance with the Fair Labor Standards Act as amended by the Portal-to-Portal Act, and as construed in *Steiner v. Mitchell*," *id.* at 263.

(4) Taken together, *Steiner* and *King* clearly establish that the workplace donning of required protective equipment and sanitary garb by the meat processing employees here at the beginning of their shift and the workplace doffing of that equipment and garb at the end of their shift are among their "principal activities" within the meaning of § 4(a) of the Portal-to-Portal Act. These employees are "compelled by circumstances, including vital considerations of health and hygiene," *Steiner*, 350 U.S. at 248—that are reflected in mandatory federal health and safety standards and in their employer's rules—(i) to don personal protective equipment and sanitary garb at the plant's donning locations before proceeding directly to the plant's killing or cutting floors; and (ii) on leaving the killing or cutting floor for the day to doff that equipment and garb at the plant's doffing locations. Thus, like the employees' workplace clothes changing and showering activities at issue in *Steiner* and the employees' knife sharpening activities at issue in *King Packing*, the employees' workplace those donning and doffing activities here are "an

integral and indispensable part of the principal activity of their employment," 350 U.S. at 256.

Of equal moment, the employees' workplace donning activities constitute the first of their "principal activities" on any given workday, and the employees' doffing activities constitutes the last of their "principal activities" for that workday[5]. It follows that engaging in that donning activity marks the beginning of the employees' "workday," and that engaging in that doffing activity marks the end of that "workday." That being so, the employees' walking from the plant's donning locations to the plant's killing or cutting floor and their walking from the killing or cutting floor to the plant doffing locations at issue here occurs during the employees "workday" proper and is beyond the reach of the Portal-to-Portal Act.

II. THE *TUM* "WAITING TIME DURING THE DONNING AND DOFFING PROCESS" ISSUE

In *Tum* the employer provides: that at the beginning of their shift its poultry processing employees are to don their required personal protective equipment and sanitary garb in the plant's hallway leading off the plant's entrance (and exit) along which is arranged an equipment cage, coat racks and equipment bins; and (ii) that at the end of their shift the employees are to doff their equipment and garb at the same plant location. In the donning process the employees must procure the required items from the employer at the equipment cage window, coat racks and equipment bins. And in the doffing process the employees must turn in to the employer the required items they had obtained in the donning process. *See Tum* Pet. App. 3a-4a. Given the employer's arrangements for the donning and doffing processes "[e]mployees may have to

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[5] As we explain in Part II, infra, the donning activity in question often entails a number of successive steps, including steps necessary to procuring the equipment and garb from the designated locations at the plant.

wait to obtain and dispense with clothing and equipment. At busier times, there may be lines at the coat racks, glove liner bins, and [equipment] cage window . . .". *Id.* at 4a.

The Portal-to-Portal Act question thus presented is whether § 4(a) privileges the employer to treat the waiting time spent by the employees in obtaining required personal protective equipment and sanitary garb from the employer, and in returning that equipment and garb, as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."

This Court's decision in *Steiner v. Mitchell*, *supra*, provides the starting point for analysis. *Steiner*, as we have emphasized, settles the critical, but still abstract, proposition that such employee workplace activities as "changing clothes at the beginning of the shift and showering at the end" that are "an integral and indispensable part of the principal activities for which the covered workmen are employed" are compensable under the FLSA as "principal activities." *See* 350 U.S. at 248 and 256. It is also very much to the point here that at a more concrete level *Steiner* establishes that it is "the time incident to [such] changing of clothes and showering", *id.* at 248, which in that case "was found to come to 30 minutes a day . . . for each employee," *id.* at 251, that is compensable under the FLSA. It could not be otherwise.

The descriptive phrase "changing clothes at the beginning of a shift" does not describe an instantaneous event—it describes an active process in which the employee takes a series of successive steps over time dictated by the nature of the task and by the nature of the employer's arrangements for the clothes changing process and the nature of the employers' clothes changing facility. Thus, an employee engages in the "principal activity" of "changing clothes" by going through a clothes changing process—*viz.* by taking the successive steps, and by spending the time on each, necessary to accomplish the required clothes changing task. That being so, as *Steiner*

recognizes, the FLSA makes compensable the time the employee spends taking the steps necessary to accomplish the "principal activity" task at hand—*viz.* the "time incident" to accomplishing that task.

The employee waiting time at issue in *Tum* is "time incident" to their donning and doffing of required personal equipment and sanitary garb and as such is compensable under the FLSA. The employer has arranged the donning and doffing processes, and structured the donning and doffing locations, so that a necessary step in the donning process is for the employee to "obtain [required] clothing and equipment" from the employer and a necessary step in the doffing process is for the employee to "dispense with [that] clothing and equipment" by returning it to the employer. And the employer has done so in a manner that may require the employee to have to wait his turn in lines at the employer's equipment points in order to obtain required items and in order to return required items. That "waiting" time "is incident" to the donning and doffing process just as surely as the time the employee spends in taking physical possession of the required items and as the time spent in the physical return of those items.

Indeed, the "waiting time" and the "obtaining time" do not measure two separate steps in the donning process, nor do the 'waiting time' and the "returning time" measure two separate steps in the doffing process. The necessary step to accomplishing the donning task of obtaining the required items is a single step that begins when the employee seeks to obtain the item and continues until the employee obtains possession of the item. And, that necessary step is part and parcel of the overall donning process. It cannot possibly be considered to be a Portal-to-Portal Act "preliminary activity" separate from the "principal activity" of donning the required protective equipment and sanitary garb. The same is true of the single step of returning the required items which cannot be con-

sidered to be a "postliminory activity" separate from the "principal activity" of doffing the required protective equipment and sanitary garb.

CONCLUSION

The judgment of the First Circuit in *Tum*, case no. 04-66, should be reversed, and the judgment of the Ninth Circuit in *Alvarez*, case no. 03-1238, should be affirmed.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

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In the Supreme Court of the United States

IBP, INC., PETITIONER

v.

GABRIEL ALVAREZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS G. HUNGAR
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Deputy Solicitor

STEVEN J. MANDEL
Associate Solicitor

MICHAEL P. DOYLE
PAUL L. FRIEDEN
JONATHAN M. KRONHEIM
IAN H. ELIASOPH
Attorneys
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

The Portal-to-Portal Act of 1947 excludes from compensation "walking * * * to and from the actual place of performance of the [employee's] principal activity or activities," but only when the walking occurs "either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). The question presented is whether the time employees must spend walking between the place where they don and doff required protective clothing and their work stations falls within that Portal Act exclusion when the donning and doffing are integral and indispensable parts of the employees' principal work activities.

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In the Supreme Court of the United States

No. 03-1238

IBP, INC., PETITIONER

v.

GABRIEL ALVAREZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The question presented in this case concerns the compensability under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947 (Portal Act), 29 U.S.C. 251 *et seq.*, of time that employees must spend walking between the place where they don and doff required protective gear and their work stations when the donning and doffing are integral and indispensable parts of the employees' principal work activities. The United States has a substantial interest in the resolution of that question. The Secretary of Labor is responsible for enforcing the FLSA as amended by the Portal Act. 29 U.S.C. 204, 211, 216(c), 259. Consistent with that responsibility, the Department of Labor has issued regulations that address the compensability of walking time. See, *e.g.*, 29 C.F.R. 785.9, 785.34, 785.38, 790.6-790.8.

At the Court's invitation, the United States filed a brief at the petition stage of this case. While the United States suggested that prudential considerations counseled against review of the walking-time issue in this case, it argued that the issue warranted review in an appropriate case, and noted that the issue was presented in *Tum* v. *Barber Foods*, cert. granted, 125 S. Ct. 1295 (2005). The Court granted certiorari in *Tum* and consolidated that case with this one. The United States has filed an amicus brief in *Tum* arguing, *inter alia*, that the time that employees must spend walking between the place where they don and doff required protective gear and their work stations is compensable when the donning and doffing are integral and indispensable parts of the employees' principal work activities.

STATEMENT

1. The Fair Labor Standards Act (FLSA) generally requires covered employers to pay their employees a minimum wage for the hours they work. 29 U.S.C. 206. The FLSA also generally requires employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207. In calculating hours worked for minimum wage and overtime purposes, the FLSA generally includes all time spent on "physical or mental exertion (whether burdensome or not) controlled or required by the employer, and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Compensable time thus generally includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946).

Applying those general principles, the Court ruled that activities that are performed before and after the employee's

normal shift can be compensable work. In *Tennessee Coal*, the Court held that underground travel between a mine's portal and the employee's work place within the mine is compensable work. 321 U.S. at 598. In *Jewell Ridge Coal Corp.* v. *Local No. 6167, UMW*, 325 U.S. 161, 163-166 (1945), the Court reaffirmed that conclusion. And in *Mt. Clemens*, 328 U.S. at 690-692, the Court held that walking from an employer's time clock to the employee's place of work and back is compensable work. *Mt. Clemens* also held that certain pre-shift activities, such as greasing arms and sharpening tools, are compensable work. *Id.* at 692-693.

Congress viewed *Mt. Clemens* as "creating wholly unexpected liabilities, immense in amount and retroactive in operation," 29 U.S.C. 251(a), and it enacted the Portal Act to address that "emergency." 29 U.S.C. 251(b). See *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956). For claims arising before the date of the Act, the Portal Act completely eliminated employer liability for failure to pay minimum wage and overtime with respect to work that was not compensable by contract or custom. 29 U.S.C. 252.

Congress took a different approach to claims arising after the date of the Act. For those claims, Congress provided that, absent contract or custom, no employer shall be liable for failure to pay minimum wages or overtime for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subse-

nt to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

Thus, absent contract or custom, the Portal Act excludes from compensation travel and other preliminary and postliminary activities when they occur before employees begin their first principal activity or after they conclude their last principal activity of the day. Travel and other activities that occur between the first and last principal activities of a workday, however, are not excluded from compensation by the Portal Act.

In *Steiner*, the Court held that time employees were required to spend changing clothes and showering before and after their shifts was not excluded from compensation under the Portal Act as "preliminary" and "postliminary" activity because it fell within the category of "principal activities." 350 U.S. at 252-253. The Court reasoned that the term "principal activity or activities" in the Portal Act encompasses all activities that are "an integral and indispensable part of the principal activities" an employee is hired to perform, *id.* at 253 (citation omitted), and that the required clothes-changing and showering at issue were an integral and indispensable part of the employees' principal employment activities. *Id.* at 256.

The Department of Labor has issued regulations construing the provisions of the Portal Act. The regulations provide that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to include all time within "the period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b). The regulations define the term "principal activities" to encompass "all activities which are an integral part of a principal activity," 29 C.F.R. 790.8(b), including "changing clothes on the employer's premises at the beginning and end of the workday," when the employee "cannot perform his principal activities without putting on [such] clothes." 29 C.F.R. 790.8(c).

2. Petitioner IBP, Inc. operates a meat packing plant in Pasco, Washington. Pet. App. 2a-3a. Employees at the plant slaughter and process meat. *Id.* at 3a. Those jobs are among the most dangerous in the United States. *Id.* at 2a.

Petitioner requires its employees to wear protective gear when performing their jobs. Pet. App. 4a n.2. All employees must wear outer garments, hardhats, hair nets, ear plugs, gloves, sleeves, aprons, leggings, and boots. *Ibid.* Employees who use knives must also wear chain-link metal aprons, leggings, vests, sleeves, and gloves, plexiglass arm guards, Kevlar gloves, and puncture-resistant protective sleeves. *Ibid.* Under petitioner's work rules, employees must gather their assigned protective gear, don the gear in a plant locker room, and prepare work tools before entering the slaughter or processing floors. *Id.* at 3a. After completing their shift on the floor, employees must clean their tools, doff their gear, and store the gear at a plant locker room. *Id.* at 3a-4a. Petitioner pays its employees for the time period that begins with the processing of the first piece of meat and ends with the processing of the last piece of meat. *Id.* at 6a.

3. Respondents work in the slaughter and processing divisions of petitioner's Pasco plant. Pet. App. 6a. They filed suit against petitioner under the FLSA and state law, challenging petitioner's failure to pay them for the time spent donning and doffing protective equipment and walking from the locker room to their work stations and back. *Ibid.*

After conducting a bench trial, the district court ruled in respondents' favor on most issues. Pet. App. 35a-82a. The

court found that the donning and doffing of unique protective gear, such as mesh gloves, metal aprons, leggings, vests, plexiglass arm guards, and protective sleeves are "integral and indispensable" parts of respondents' principal activities and are therefore compensable work under the FLSA. *Id.* at 54a. The court further determined that a reasonable amount of time walking from the locker room to the work station and back is compensable. *Id.* at 54a. The district court rejected petitioner's contention that such walking time is non-compensable under the Portal Act. *Id.* at 53a-54a. The court reasoned that donning protective gear begins the workday and doffing that gear ends it, and that the Portal Act's exclusion applies only to walking time that occurs outside the workday. *Ibid.*[1]

4. The court of appeals affirmed the district court's FLSA rulings. Pet. App. 1a-34a. The court of appeals held that donning and doffing of protective gear are "integral and indispensable" parts of respondents' principal activities and are therefore work that is compensable under the FLSA. *Id.* at 11.

The court also held that respondents are entitled to compensation for "the reasonable walking time from the locker to work station and back * * * for employees required to don and doff compensable personal protective equipment." Pet. App. 18a. The court reasoned that respondents' workday begins when they don required safety

[1] The district court rejected petitioner's argument that the donning and doffing of unique protective gear are non-compensable as a result of collective bargaining pursuant to the FLSA's clothes-changing exclusion in 29 U.S.C. 203(*o*). Pet. App. 64a-65a. And it determined that the donning and doffing of "non-unique protective equipment"—hardhats, earplugs, frocks, safety goggles, hair nets, and boots—are not compensable in part because the "time it takes to complete such work is de minimis as a matter of law." *Id.* at 54a & n.6. The court of appeals affirmed both rulings, *id.* at 13a-17a, and they are not at issue here.

gear, that walking from the locker room to the work station and back occurs during the workday, and that the Portal Act does not exclude from compensation walking that occurs during the workday. *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

The time that petitioner's employees must spend walking between the place where they don and doff required protective gear and their work stations is compensable. Under the FLSA and the Portal Act, walking time is compensable when it occurs during the workday. Because the workday of petitioner's employees begins when they don protective gear and ends when they doff that gear, the walking in between occurs during the workday and is compensable.

A. The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946). The Portal Act creates a limited exception to that general rule, excluding from compensation travel time and "preliminary" and "postliminary" activities, but only when they occur outside the workday—either before an employee "commences" or after he "ceases" his "principal activity or activities." 29 U.S.C. 254(a).

In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), the Court held that the donning and doffing of clothing are "principal activities" within the meaning of the Portal Act when they "are 'an integral and indispensable part of the principal activities.'" *Id.* at 253 (citation omitted). Under *Steiner*'s interpretation of the Portal Act, when donning and doffing of required protective gear are integral and indispensable parts of the employees' principal activities, walking that occurs *after the commencement of donning and before the completion of doffing* occurs during the workday. Such post-

donning and pre-doffing walking therefore falls outside the Portal Act and is compensable. As both courts below concluded, here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal work activities. Accordingly, the walking that occurs after the commencement of donning and before the completion of doffing is compensable.

B. Petitioner argues that *Steiner* did not hold that the term "principal activities" includes integral and indispensable activities. That argument ignores the dispositive language from *Steiner* as well as the legislative history and agency interpretation that underlie the Court's express and unambiguous holding.

C. The Department of Labor's longstanding regulations confirm that the walking time at issue is compensable. Those regulations provide that the Portal Act "ha[s] no application" to walking that occurs during the "workday," *i.e.*, during the time period "after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday." 29 C.F.R. 785.38, 790.6, 790.7(c). Because the walking time at issue occurs during the workday, it is compensable under the regulations.

D. The Secretary's interpretation is consistent with the purposes of the Portal Act. That Act's principal purpose was to remedy the large and unexpected retroactive liability created by the Court's holding in *Mt. Clemens* that walking from the time clock to an employee's work station and certain other preliminary activities were compensable. Congress fully addressed that emergency by enacting a purely retrospective provision that relieved employers of that liability for activity occurring before enactment of the Portal Act.

For prospective claims, Congress sought to preserve the existing law that had required compensation for all activities

during the workday and had included within the workday all activities that are integral and indispensable to an employee's principal work activities. The only way in which Congress sought to cut back on existing law was by excluding from compensation walking and certain other activities that take place before the workday begins and after it ends. Because the post-donning and pre-doffing time at issue here occurs during the workday, the Secretary's position that such walking time is compensable is consistent with the purposes of the Portal Act.

E. A holding that the walking time at issue is compensable does not lead to anomalous results. The supposed anomalies identified by petitioner are simply the consequence of the FLSA's allocation of authority to the employer to determine when and where its employees will perform their principal activities, and the Portal Act's bright-line rule that an employee's workday begins with his first principal activity.

ARGUMENT

Under the FLSA and the Portal Act, walking time is compensable when it occurs during the workday. The workday of petitioner's employees begins when they don protective gear in the locker room and it ends when they doff and store their gear in the locker room. Accordingly, as the court of appeals correctly held, the time that respondents must spend walking from the locker room to their work stations and back occurs during the workday and is compensable.

A. The Walking Time At Issue Is Compensable Under The Language Of The Portal Act As Interpreted In *Steiner*

1. The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed

workplace." *Anderson* v. *Mt. Clemens*, 328 U.S. 680, 690-691 (1946). That rule reflects Congress's judgment that an employee should generally receive compensation for all time that he is under the direction or control of the employer. *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

The Portal Act creates a limited exception to that general rule. It excludes from compensation "walking" to and from "the actual place of performance" of an employee's principal activity or activities, and other "preliminary" and "postliminary" activities, but only when they occur outside the "workday"—"either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). Walking that occurs during the workday—after the employee commences his first principal activity and before he concludes his last principal activity—is not affected by the Portal Act. Instead, such walking is compensable in accordance with the general rule that compensation is required for all time the employee is required to be "on the employer's premises, on duty or at a prescribed workplace." *Mt. Clemens*, 328 U.S. at 691.

2. Because the Portal Act only excludes from compensation walking that occurs before an employee's first principal activity and after the employee's last principal activity, the scope of the Portal Act's exclusion depends on the meaning of the term "principal activity." The Court addressed the meaning of that term in *Steiner*. In that case, the Court held that the term "principal activity or activities" in the Portal Act "embraces all activities which are an integral and indispensable part of the principal activities." 350 U.S. at 252-253 (citation omitted). Based on that interpretation, the Court held that clothes changing and showering that are integral and indispensable parts of an employee's

principal job activities are themselves encompassed within the category of principal activities and therefore fall outside the scope of the Portal Act's exclusion for preliminary and postliminary activity. *Id.* at 256.

3. Applying the terms of the Portal Act as interpreted in *Steiner* to the circumstances of this case, the time petitioner's employees spend walking between the locker rooms where they don and doff protective gear and their work stations is compensable. In order to perform their jobs, petitioner's employees are required by petitioner to don and doff protective gear on petitioner's premises. Pet. App. 3a-4a & n.2. Accordingly, as the court of appeals determined, here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal job activities and therefore qualify as compensable "principal activities" within the meaning of the Portal Act. See *id.* at 11a-13a.

Because petitioner's employees' first act integral and indispensable to their "principal activity" is donning their protective gear and their last such act is doffing that gear, those activities mark the boundaries of their "workday" and determine the scope of the Portal Act's walking-time exclusion. 29 U.S.C. 254(a). Thus, the walk from the plant entrance to the locker room at the beginning of the day is excluded from compensation because it occurs "prior to the time" at which petitioner's employees "commence[]" the "principal activity" of donning. *Ibid.* Similarly, the walk from the locker room to the plant exit at the end of the day is excluded from compensation because it occurs "subsequent to the time" at which petitioner's employees "cease[]" their "principal activity" of doffing. *Ibid.* In contrast, the walk from the locker room to the work station at the beginning of the day and the reverse walk at the end of the day occur *after* petitioner's employees "commence[] the principal activity" of donning and *before* they "cease[] their "principal

activity" of doffing. *Ibid.* Those walks therefore occur *during* the "workday" and are compensable. *Ibid.*

B. Petitioner's Efforts To Show That *Steiner* Is Not Controlling Are Unpersuasive

1. Petitioner does not challenge the court of appeals' determination that the donning and doffing of protective gear are integral and indispensable parts of its employees' principal activities. Instead, relying on a dictionary definition of the term "principal," petitioner argues that the term "principal activity or activities" refers to the "the most important or consequential task (or tasks) the employee was hired to accomplish." Pet. Br. 15. Petitioner further argues that integral and indispensable donning and doffing do not fall within that definition. *Ibid.*

Petitioner's resort to a dictionary definition is unavailing, because the Court authoritatively construed the term "principal activity or activities" in *Steiner* to encompass activities that are integral and indispensable parts of principal activities. Once the Court authoritatively construes a statute, that interpretation becomes "an integral part of the statute" that "should be accepted and followed." *Gulf, C. & S. Ry.* v. *Moser*, 275 U.S. 133, 136 (1927); see *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation."). In the intervening fifty years since *Steiner*, neither Congress nor this Court has altered *Steiner*'s interpretation of the term "principal activity or activities." Petitioner offers no basis for revisiting that interpretation now.

2. Relying on highly selective quotations from the Court's opinion, petitioner claims that *Steiner* did not hold that the term "principal activity or activities" includes activities that are integral and indispensable parts of an employee's principal activities, but instead held only that the terms "preliminary" and postliminary" in 29 U.S.C. 254(a)(2)

do not include integral and indispensable activities. Pet. Br. 17-18. In fact, however, *Steiner* expressly and unambiguously held that the term "principal activity or activities" includes integral and indispensable activities.

The *Steiner* Court posed the question presented as "whether workers in a battery plant must be paid *as a part of their 'principal' activities* for the time incident to changing clothes at the beginning of the shift and showering at the end." 350 U.S. at 248 (emphasis added). The Court then answered that question by squarely holding that it "agreed" with the "conclusion" of the court of appeals in that case that "the term 'principal activity or activities' in Section 4 *embraces all activities which are 'an integral and indispensable part of the principal activities,'* and that the activities in question fall within this category." *Id.* at 252-253 (emphasis added). See *id.* at 255 (noting that the "clear implication" of Section 3(*o*) of the Act, 29 U.S.C. 203(o), is "that clothes changing and washing * * * are * * * a *part of the principal activity*" unless excluded under a collective bargaining agreement) (emphasis added). The Court's opinion in *Steiner* thus squarely forecloses the interpretive approach advocated by petitioner.

The Court based its unambiguous holding to that effect on two equally unambiguous sources. First, the Court found "persuasive" Senator Cooper's colloquy with other Senators, 350 U.S. at 254, and took the unusual step of attaching it as an appendix to its opinion. *Id.* at 256-259. In that colloquy, Senator Cooper stated that "[w]e believe that in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity." *Id.* at 256-257.

Senator Cooper also quoted the Senate Report's statement that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof." *Id.* at 257. And Senator Cooper further stated that "in accordance with our intention as to the definition of 'principal activity,' if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity." *Id.* at 258.

Second, the Court based its interpretation on a regulation issued by the Department of Labor. See 350 U.S. at 255 & n.9. That regulation confirms that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity," 29 C.F.R. 790.8(b), including "changing clothes on the employer's premises" if that activity is an integral part of the employee's principal activity, 29 C.F.R. 790.8(c).

Remarkably, petitioner does not even mention, much less attempt to deal with, the dispositive language from *Steiner* interpreting the term "principal activity or activities" to encompass integral and indispensable activities. Nor does petitioner acknowledge the unambiguous legislative history and agency interpretation to the same effect that underlie the Court's holding. Petitioner instead argues that *Steiner* could not have held that integral and indispensable donning and doffing were principal activities because the Portal Act refers to principal activities that commence and cease at an "actual place of performance" of such activities, and the actual place of performance of the employees' principal activities in *Steiner* was the production floor, not the locker room. Pet. Br. 18-19. But the employer made that very argument in *Steiner*, see 350 U.S. at 251-252, and the Court squarely rejected it, holding that integral and indispensable clothes changing is a compensable principal activity whether it occurs "on or off the production floor." *Id.* at 256. Contrary to petitioner's assertion, moreover, *Steiner*'s holding that integral and indispensable donning and doffing are principal activities does not mean that the principal activities of the employees in that case occurred at the locker room *rather than* the production floor. Instead, it means that the employees' principal activities were viewed at a sufficiently high level of generality that they spanned *both* the locker room and the production floor. Petitioner's argument is thus unfounded.

Petitioner ultimately appears to recognize that the term "principal activity or activities" encompasses integral and indispensable activities because it concedes that the Court held in *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), the companion case to *Steiner*, that "knife sharpening is a compensable 'principal' activity of butchers in [a] meatpacking plant." Pet. Br. 17 n.7. The Court held that knife sharpening was a principal activity only because it was "an integral part of and indispensable to the various butchering activities for which [the employees] were principally employed[.]" 350 U.S. at 263. Just as knife sharpening that is integral and indispensable to a principal activity is itself encompassed within the category of "principal activities," donning and doffing of protective gear likewise fall within that category when they are integral and indispensable to a principal activity. Petitioner offers no basis for distinguishing between the two.

3. Petitioner argues (Br. 18) that even if integral and indispensable donning and doffing are "principal activities" within the meaning of the Portal Act, it does not follow that they can start and end the workday. Petitioner is mistaken. Under the terms of the Portal Act, the "workday" begins when an employee "commences" his "principal activity or activities," and it ends when an employee "ceases" his "principal activity or activities." 29 U.S.C. 254(a). Thus, once it is accepted that integral and indispensable donning and doffing

are themselves "principal activities," it necessarily follows that donning at the beginning of the day "commences" the employee's "principal activities" and therefore begins the "workday," and that doffing at the end of the day "ceases" the employee's "principal activities" and therefore ends the "workday." *Ibid.*

The Senate Report accompanying the Portal Act confirms that conclusion. That Report states: "It will be observed that the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[] the beginning and end of his workday." S. Rep. No. 48, 80th Cong., 1st Sess. 48 (1947). In the very next sentence, the Report states: "The term 'principal activity or activities' includes all activities which are an integral part thereof." *Ibid.* Those two sentences confirm that integral and indispensable donning and doffing will start and end the workday.

Petitioner argues (Br. 18) that even if integral and indispensable donning and doffing are principal activities that begin and end the workday, the walking time at issue nonetheless falls within the Portal Act's exclusion for "walking * * * to and from the actual place of performance of the [employee's] principal activity or activities." 29 U.S.C. 254(a). Once again, petitioner is mistaken. The Portal Act's walking-time exclusion applies only when the walking occurs "either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, [his] principal activity or activities." 29 U.S.C. 254. Once it is accepted that integral and indispensable donning and doffing are principal activities that begin and end the workday, it necessarily follows that those activities occur in the actual place of performance of principal activities and that walking in between such places does not occur "either prior to the time" at which an employee "commences," or "subsequent to the

time" at which the employee "ceases," his "principal activity or activities." *Ibid.* Such walking therefore falls outside the Portal Act exclusion and is compensable.

4. Finally, petitioner argues that 29 U.S.C. 254(a) excludes from compensation "*all* pre- and post-shift walking." Pet. Br. 21; see *id.* at 24. The terms "pre-and post-shift" walking, however, do not appear anywhere in the text of Section 254(a). Moreover, the whole point of Section 254(a) is to determine the relevant compensable time period and when it begins and ends. Certainly the employer's conception of what constitutes "pre-shift" and "post-shift" walking is no more controlling than what the employees label the shift. Regardless of the employer's designation of the "shifts," the relevant statutory inquiry marks the beginning of the compensable workday from the first act integral and indispensable to an employee's principal activities and ends the compensable workday with the last such act. When, as here, disputed walking time occurs after the first principal activity and before the last principal activity, it is not subject to the Portal Act and is compensable.

In arguing otherwise, petitioner erroneously relies (Br. 19) on the statement in *Steiner* that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and are not specifically excluded by Section 4(a)(1).*" 350 U.S. at 256 (emphasis added). Rather than recognizing a sweeping pre- and post-shift walking exemption that has no textual anchor, the emphasized part of that statement simply means that walking that precedes the first principal activity or follows the last principal activity cannot itself be a compensable principal activity based on the theory that it is an integral and indispensable part of those principal activities. As the

Court's statement reflects, 29 U.S.C. 254(a)(1) absolutely excludes such walking from the category of principal activities, and that absolute exclusion cannot be overcome based on the theory that the walking alone is an integral and indispensable part of the employees' first and last principal activities. See 93 Cong. Rec. 2297 (1947) (Sen. Cooper) ("[w]alking, riding, or traveling time to the place where the principal activities are performed has been eliminated as a principal activity"); *id.* at 2299 (Sen. Cooper) (while the term "principal activity" embraces activities that are "indispensable to the performance of productive work," the walking, traveling, and riding covered by the Portal Act "are not an integral part of the employment for which the worker is employed").

In this case, however, the award of compensation for walking time is not based on the mistaken view that walking that precedes the first principal activity and follows the last principal activity is compensable as an integral and indispensable part of those principal activities. Instead, the court of appeals awarded compensation only for walking time that occurs *after* petitioner's employees commence their first principal activity of donning protective gear and *before* they cease their last principal activity of doffing that gear. The text of the Portal Act as interpreted in *Steiner* makes clear that such walking time is compensable, and nothing in the statement relied on by petitioner suggests otherwise.

C. The Department Of Labor's Regulations Confirm The Compensability Of The Walking Time At Issue Here

1. The Department of Labor has issued interpretive regulations that set forth principles for determining the number of hours worked, 29 C.F.R. Pt. 785, and address the effect of the Portal-to-Portal Act on that computation. 29 C.F.R. Pt. 790. The hours-worked regulations have their origin in Interpretive Bulletin No. 13, which was originally

issued in 1939 (shortly after enactment of the FLSA), and which was in effect when Congress enacted the Portal Act. The Portal Act regulations were originally issued in 1947, immediately after enactment of that Act. See 12 Fed. Reg. 7655 (1947). Those contemporaneous and longstanding regulations, which have been left undisturbed by Congress in its numerous subsequent reexaminations of the FLSA and which reflect the considered and detailed views of the agency charged with enforcing the FLSA and the Portal Act, are entitled to deference. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002) (*Chevron* deference appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given to the question over a long period of time"); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").[2]

The Department's regulations reinforce the conclusion that walking is compensable when it occurs after the commencement and before the completion of compensable donning and doffing. The hours-worked regulations explain that compensable work generally includes all time "during which an employee is necessarily required to be on the

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[2] In 1949, moreover, as this Court indicated in *Steiner*, Congress amended the FLSA but specifically retained the Portal Act regulations, without expressing any disagreement with the provisions relevant here. See 350 U.S. at 255 & n.8; Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920. Indeed, petitioner concedes (Br. 31) that the Department's regulations interpreting the Portal Act were "adopted shortly after passage of the Portal Act and subsequently ratified by Congress."

employer's premises, on duty or at a prescribed work place." 29 C.F.R. 785.7 (citation omitted). That general rule applies not only to the time that an employee is involved in productive work, but also to required waiting time, 29 C.F.R. 785.7, 785.14-785.17, normal rest periods, 29 C.F.R. 785.18, and travel during the course of the workday. 29 C.F.R. 785.38. The hours-worked regulations except from that general rule and treat as non-compensable only "bona fide meal periods," 29 C.F.R. 785.19, and "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes." 29 C.F.R. 785.16.

The Portal Act regulations reaffirm that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to "include[] *all time* within" the "period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b) (emphasis added). Thus, "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. 790.6(a).

The regulations specifically address the effect of that rule on the compensability of travel. They explain that time spent walking from the plant gate to the place where the employee performs his principal activity is excluded by the Portal Act from the category of "principal activities" and is not compensable. 29 C.F.R. 790.7(f), 790.8(a). On the other hand, travel from the place of performance of one principal activity to the place of performance of another principal activity is not subject to the Portal Act (because it occurs

during the workday) and is instead subject to the general rules for determining compensability under the FLSA. 29 C.F.R. 790.7(c).

Thus, under the Department's regulations, "[t]ime spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked." 29 C.F.R. 785.38. For example, when an employee is required to report to a designated place to pick up his tools, and must then travel to another location to perform his work, "the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked." *Ibid.* Similarly, if an employee is required to report to a designated place for instructions, the travel from the place where he receives his instructions to the place where he carries out those instructions must be counted as hours worked. *Ibid.* In those examples, picking up tools and receiving instructions are integral and indispensable parts of the employees' principal activity or activities, and accordingly qualify as principal activities for purposes of the Portal Act. 29 C.F.R. 790.8(b). As a result, the travel that occurs after those initial activities and before the end of the workday is excluded from the scope of the Portal Act.

This case is controlled by the foregoing principles. As the court of appeals found, the donning and doffing of protective gear on petitioner's premises are integral and indispensable parts of the principal activities of petitioner's employees and therefore qualify as "principal activities." See 29 C.F.R. 790.8(c). The employees' workday therefore commences with donning and ends with doffing, and the necessary walking that occurs between those two points falls outside the Portal Act and is compensable.[3]

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[3] The Department of Labor has consistently taken the position in litigation that walking that occurs after integral and indispensable don-

2. Petitioner argues that the regulations support its position that the walking time at issue falls outside the workday because the regulations describe the workday as running from "whistle to whistle," and the "whistle to whistle" period in this case "runs from the time respondents must arrive at their work stations until the time they finally leave those posts at the end of the shift." Pet. Br. 31 (quoting 29 C.F.R. 790.6(a)). But petitioner fails to quote the remainder of the regulation on which it relies. What the regulation actually says is that the workday may be "*roughly* described as the period 'from whistle to whistle,'" 29 C.F.R. 790.6(a) (emphasis added), and it then specifies that the workday for purposes of the Portal Act encompasses the "period between the commencement and completion on the same workday of an employee's principal activity or activities," 29 C.F.R. 790.6(b). The Department's regulations further make clear that the length of the compensable workday is not controlled by the employer's designated shift or by when the whistle blows and that "[t]he 'workday' may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line." 29 C.F.R. 785.9(a). Thus, while the "whistle to whistle" period may provide a rough guide, under the Department's regulations—which petitioner describes as having been "ratified by Congress" (Br. 31)—the workday extends from the employees' first principal activity of donning to their last principal activity of doffing.

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ning and before integral and indispensable doffing is compensable. It has filed suits seeking compensation for such walking time. See *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala. filed May 9, 2002); *Chao* v. *George's Processing, Inc.*, No. 6:02-CV-03479-RED (W.D. Mo. filed Nov. 20, 2002). It has obtained a consent decree that requires such compensation. *Chao* v. *Perdue Farms, Inc.*, Case No. 2:02-CV-0033 (M.D. Tenn. entered May 10, 2002). And it filed amicus briefs in the Ninth Circuit in this case and in the First Circuit in *Tum* arguing that such walking time is compensable.

Petitioner also argues (Br. 31) that a footnote in the Portal Act regulations "makes clear that a compensable 'integral and indispensable' activity does not render compensable all time spent walking between that activity and the actual work station." The footnote states:

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. 790.7(g) n.49 (citations omitted).

The exact import of the footnote is unclear on its face, particularly in light of the fact that the first-quoted sentence refers to postliminary activity whereas the second sentence seems to contemplate travel occurring *after* the washing or clothes-changing activity at issue (which, in the case of travel after postliminary activity (*e.g.*, post-doffing walking), would certainly be excluded from otherwise compensable time by the Portal Act in any event). At most, that passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act. Even that reading would provide no support for petitioner's contention that the Portal Act always excludes such walking from compensation.

In any event, the ambiguous passage cited by petitioner should not obscure what is clear. First, the regulations discussed above reflect the Department of Labor's long-

established general position that post-donning and pre-doffing walking falls outside the Portal Act when the donning and doffing are integral and indispensable parts of an employee's principal activities. In particular, that general position follows from the regulatory text providing that the Portal Act has no effect on walking that occurs during the workday, 29 C.F.R. 790.6(a), that the workday commences with the first principal activity and ends with the last principal activity, 29 C.F.R. 790.6(b), and that activities like donning and doffing that are integral and indispensable to a principal activity are themselves principal activities. 29 C.F.R. 790.8(b), 790.8(c).

Second, in the many years in which the Department has enforced the FLSA and the Portal Act, it has not issued any ruling identifying any circumstance in which walking that occurs in between integral and indispensable donning and doffing would be excluded from compensation under the Portal Act. And third, the Secretary has repeatedly taken the position in litigation that, in circumstances like those presented here, the Portal Act does not exclude from compensation walking that occurs after the commencement and before the completion of compensable donning and doffing. See n. 3, *supra*. In those circumstances, the regulations as a whole support the Secretary's position that the walking time at issue in this case is compensable.

Any doubt regarding the meaning of the regulations must be resolved in favor of the Secretary's interpretation. As this Court has recognized, courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its regulations as set forth in amicus brief). The detailed and comprehensive regulations discussed above, when read as a whole, plainly support the Secretary's position regarding the compensability of

walking time like that at issue here. And in any event, that conclusion is also compelled by the text of the Portal Act as interpreted in *Steiner*.

D. A Holding That The Walking Time At Issue Is Compensable Is Consistent With The Purposes Of The Portal Act

Petitioner argues (Br. 26-30) that a holding that the walking time at issue is compensable would defeat the purposes of the Portal Act. Such a holding, however, would have no such effect.

The principal purpose of the Portal Act was to remedy an existing "emergency" that had been created by the Court's holding in *Mt. Clemens* that walking from the time clock to an employee's work station and certain other preliminary activities were compensable work. See 29 U.S.C. 251(b); *Steiner*, 350 U.S. at 253. Employees filed numerous claims in the wake of *Mt. Clemens*, and Congress believed that if those claims were allowed to proceed it would create "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). As the Court explained in *Steiner*, 350 U.S. at 255-256, Congress fully addressed that emergency by enacting Section 2 of the Portal Act, 29 U.S.C. 252, which relieved employers of all liability under the FLSA for activity that occurred before the enactment of the Portal Act, and eliminated federal court jurisdiction to adjudicate such claims, except where the activity was compensable under a contract or custom. See *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.) (upholding the constitutionality of Section 2), cert. denied, 335 U.S. 887 (1948).

Congress addressed prospective claims in Section 4 of the Act, 29 U.S.C. 254. For those claims, Congress did not intend any equivalent change from existing law. As the Court explained in *Steiner*, had Congress intended such a sweeping change, it would have made Section 2 prospective

as well as retroactive. 350 U.S. at 255-256. Instead, by limiting Section 4 to activities outside the "workday," 29 U.S.C. 254(a), by using the term "principal activities" to mark the boundaries of the compensable workday, *ibid*, and by including "integral and indispensable" activities within the concept of "principal activities," 350 U.S. at 252-253, Congress largely sought to "preserve[] to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act." *Id.* at 256 (Appendix) (quoting 93 Cong. Rec. 2297 (1947) (statement of Sen. Cooper)). The only way in which Congress sought to cut back on existing law was by excluding from compensation preliminary and postliminary activities and walking that occur outside the workday. See 29 U.S.C. 254(a)(1) and (2); 93 Cong. Rec. at 2299 (statement of Sen. Cooper). Because the walking time at issue occurs during the workday, a holding that such walking is compensable is fully consistent with the purposes of the Portal Act.

E. A Holding That The Walking Time At Issue Is Compensable Does Not Produce Anomalous Results

1. Petitioner argues that it is anomalous to hold that the walking time at issue is compensable, and identifies as the chief anomaly (Br. 32-33) the possibility that an employee who is required to retrieve gear at the gate would receive compensation for the walk to his work station, while an employee who is required to retrieve his gear at the work station would receive no compensation for the same walk. But an employer is entirely free under the FLSA and the Portal Act to require any or all of its employees to retrieve gear at whatever location(s) it chooses. To the extent that an employer chooses—presumably for its own convenience—to require its employees to retrieve gear at different locations, however, any differences in compensation for walking time that results would simply reflect the FLSA's allocation

of authority to the employer to control where its employees must begin their principal activities, and the Portal Act's creation of a bright-line rule that excludes walking time only when it occurs before the commencement of the first principal activity.

2. Petitioner argues that another consequence of treating integral and indispensable donning as a principal activity is that it could trigger compensation for post-donning walks that take more time than donning. Pet. Br. 35. But all travel within the workday has the potential to be long in relation to the time spent "actually working" at the destination, yet all such time is compensable. Moreover, nothing in the Portal Act precludes an employer from reducing the amount of walking time by placing the location for donning close to the employees' work station.

Furthermore, Congress chose to permit the first and last "principal activity" to begin and end the workday, respectively, regardless of how long such activity takes to perform. 29 U.S.C. 254(a). As the legislative history shows, Congress's refusal to establish a minimum time period for an activity to qualify as a compensable "principal activity" was not inadvertent. During the course of the Senate debates, Senator McGrath asked Senator Cooper whether an employee's pre-shift activity of handing out clothes in the morning had to consume at least 30 minutes before it would be regarded as a compensable principal activity. Senator Cooper responded that it would be a compensable principal activity whether it took "15 minutes or 10 minutes or five minutes or any other number of minutes." 93 Cong. Rec. at 2298. Congress thus deliberately established a bright-line rule under which the first principal activity starts the workday regardless of how long it takes, rendering any subsequent activity, including walking time, outside the scope of the Portal Act.

The examples cited in the Department's regulations of picking up tools or receiving instructions at a designated location before traveling to a work site illustrate the effect of Congress's choice. See 29 C.F.R. 785.38. Picking up tools or receiving instructions might take only a few minutes or less. But as the regulations make clear, both activities are principal activities that can begin the workday, thereby rendering subsequent travel of much longer duration compensable. Similarly, when an employer requires its employees to don protective gear at a location that is distant from their work stations, there is nothing anomalous about requiring the employer to compensate its employees for travel from that location to the work station. Instead, as in the examples cited in the regulations, compensation under those circumstances implements the FLSA's basic rule that employees should receive compensation for all time during the workday that they are under the direction and control of the employer.

3. Petitioner also identifies as an anomalous consequence of the court of appeals' decision the fact that employees whose donning and doffing were found to be compensable will receive compensation for associated walking time, while employees whose donning and doffing were found non-compensable will not. Pet. Br. 35. But that difference flows from the court of appeals' ruling (unchallenged by respondents) that the donning of certain items could be treated as non-compensable under the de minimis rule without regard to the amount of associated walking time. For reasons explained in the government's brief in *Tum* (at 26-27), the court of appeals erred in its application of the de minimis rule. The de minimis rule applies to the aggregate amount of time for which an employee seeks compensation, not separately to each discrete activity. Thus, both sets of employees identified by petitioner should receive compensation

for walking time, unless the aggregate amount of donning, doffing, and associated walking time is de minimis.

In any event, Congress expressly contemplated that donning gear could be a compensable principal activity for some employees and not others. See 29 C.F.R. 790.8(c) & n.66 (relying on the statement of Senator Cooper appearing at 29 Cong. Rec. at 2298). There is nothing anomalous about that difference in compensability also having consequences for the compensability of associated walking time. To the contrary, it is simply the result of the Portal Act's bright-line rule that the workday begins with the first principal activity.

4. Petitioner argues (Br. 37) that another consequence of the court of appeals' ruling is that even when the donning of particular items of gear is excluded from compensation pursuant to collective bargaining under 29 U.S.C. 203(*o*), associated walking time is compensable. The court of appeals, however, did not make any ruling on that issue, and the resolution of that question would depend on the proper construction of Section 203(*o*)—a question that is not presented here.

5. Finally, petitioner contends (Br. 38) that the court of appeals' judgment awarding compensation for only a "reasonable" amount of walking time is "flatly inconsistent" with the court's holding that "the workday actually commences with the first integral and indispensable act" and is continuous thereafter until the cessation of the last such act. Petitioner further contends (*ibid.*) that the court's judgment also conflicts with a Department of Labor regulation that specifies that an employee generally must be paid for all time within the workday, "whether or not the employee engages in work throughout all of that period." See 29 C.F.R. 790.6(b). Those contentions are without merit. The lower courts awarded compensation for a "reasonable" period of walking time as a *remedial* measure, and did so in circumstances in which petitioner did not keep records of the

time actually devoted to such walking. See Pet. App. 47a. Such a remedial approach does not impermissibly create a discontinuous workday or conflict with Section 790.6(b). It simply recognizes that when an employer has not kept accurate records, remedial awards may reflect a degree of approximation. *Mt. Clemens*, 328 U.S. at 687-688.

Thus, petitioner has failed to identify any anomaly that results from a holding that the walking time at issue is compensable. In any event, the text of the Portal Act as authoritatively interpreted in *Steiner* compels the conclusion that the walking time at issue is compensable because it occurs during the "workday"—after petitioner's employees' "commence[]" their "principal activity" by donning protective gear and before they "cease[]" their "principal activity" by doffing that gear. 29 U.S.C. 254(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

THOMAS G. HUNGAR
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Deputy Solicitor

STEVEN J. MANDEL
Associate Solicitor

MICHAEL P. DOYLE
PAUL L. FRIEDEN
JONATHAN M. KRONHEIM
IAN H. ELIASOPH
Attorneys
Department of Labor

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In The Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

WILLIAM RUTZICK*
KATHRYN GOATER
SCHROETER, GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

DAVID N. MARK
LAW OFFICE OF DAVID N. MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Counsel for Respondents

August 1, 2005

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under Section 4(a) of the Portal-to-Portal Act of 1947, an employer need not pay wages under the Fair Labor Standards Act of 1938 ("FLSA") for time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform . . . which occur[s] either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

The question presented is:

(1) Whether walking is excluded from compensation under §4(a) where it occurs after the workday commences and before the workday ceases based on the performance of non-production principal activities under §4(a) as interpreted by *Steiner v. Mitchell*, 350 U.S. 247 (1956) and 29 C.F.R. §790.

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STATEMENT

A. Proceedings Below.

In 1998, Respondents (referred to herein as "plaintiffs") filed this class action in the United States District Court for the Eastern District of Washington complaining of unpaid pre-production, meal break and post-production work. *See* Pet. App. 35a, 42a & 75a; J.A. 17-27 (second amended complaint).[1] Plaintiffs alleged violations of the FLSA overtime requirement, 29 U.S.C. §207, state minimum wage and overtime law, and a failure to provide a second paid rest break on workdays of 8 hours or more in violation of state law. *Id.* The District Court certified an FLSA opt-in class, under 29 U.S.C. §216(b), and exercised supplemental jurisdiction over the 815 opt-in class members' state law claims. Pet. App. 44a-45a.

In 2000, the case was tried to the District Court, without a jury. The District Court heard testimony from over 40 production line workers. *See* Pet. App. 35a & 49a. The District Court admitted into evidence the specialized meat-packing equipment (including a metal mesh apron, a metal mesh apron with leggings, a metal mesh vest, metal mesh sleeves, a metal mesh glove, a plexiglas armguard, a Kevlar sleeve, a Kevlar glove and a variety of hand tools such as meat hooks and steels),[2] plant diagrams with job titles and

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[1] Plaintiffs abbreviate the appendices as follows:

"J.A."	Joint Appendix
"Pet. App."	Appendix to Petition for a Writ of Certiorari
"Resp. App."	Appendix to Brief in Opposition to Petition for A Writ of Certiorari

[2] Plaintiffs' Exhibits ("Pl. Exhs.") 120 & 120A-120BB, Trial Transcript ("Trial Tr.") 187:25-188:11.

locations,[3] "Required Personal Protective Equipment" lists for each job,[4] and videotapes of pre-production, meal break and post-production work.[5] Time study experts testified for each side. *See* Pet. App. 50a. IBP was held liable under the FLSA and state law for failing to pay for pre-production, meal break and post-production work. *See* Pet. App. 47a-51a. Moreover, IBP was held liable under state law for not providing a second paid rest break. Pet. App. 76a.

The District Court held that "the donning, doffing, cleaning and storage of required equipment, safety and otherwise, are integral and indispensable to the workers' duties as meat processors." Pet. App. 58a; *see also* Pet. App. 53a. The walking time between the locker and the production floor for employees was held compensable because it occurred during the workday. Pet. App. 54a. As is discussed *infra,* the District Court awarded damages

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[3] Defendant's Exhibits ("Def. Exhs.") 369 & 369A (slaughter floor chart and list of jobs), Trial Tr. 2860:20-24; Def. Exhs. 370 & 371A-D (processing floor chart, cooler department 715, bone department 765, and hamburger mezzanine), Trial Tr. 2998:16-17, 3000:25-3001:6 & 3133:22-3134:13, respectively.

[4] Pl. Exh. 90 (slaughter June 1994), Trial Tr. 1521; Pl. Exh. 91 (processing June 1994), Trial Tr. 3550:20-3551:2 & 3553:17-18; Pl. Exh. 92 (processing Dec. 1999), Trial Tr. 774; Pl. Exh. 93 (slaughter April 2000), Trial Tr. 1597:4-16 & 1600:13-19.

Plaintiffs also introduced with each testifying class member an exhibit listing his or her equipment and tools, for each job performed during the class period. Pl. Exh. 1000-1013, 1014-1021, 1023-1024, 1027-1031, 1033-34 & 1039-1047, Trial Tr. 187, 296, 378, 448, 538, 493, 578, 669, 630, 730, 859, 1042, 1073, 1097, 1201, 1232, 1455, 1484, 1518, 1536, 1579, 1602, 1698, 1741, 1784, 1816, 1838, 1880 & 1889, 1910 & 1923, 2264, 2290, 2443, 2466, 2508, 2542, 2578, 2611, and 2634, respectively.

[5] Pl. Exh. 174, Trial Tr. 1260:3-8, viewed and discussed *inter alia* at Trial Tr. 1237:20-1301:10 (Martinez pre-production and post-production in processing) & Trial Tr. 1602:21-1626:1 (Moreno, pre-production and post-production in slaughter); Pl. Exhs. 175A-F, Trial Tr. 1318:15-23, 1319:19-20 & 2048:22-2049:1.

based on time-studied equipment and activity minutes applicable to each specific job classification for each class member on a daily basis throughout the damages period. *See* Pet. App. 77a-78a. Damage reports were admitted by stipulation of the parties. Pl. Exhs. 1057-1068, Trial Tr. 4593:21-4594:16. The District Court entered judgment in favor of the workers for $3,098,517, including $1,751,126 in FLSA overtime damages. Resp. App. 1b. Both sides appealed.

The Court of Appeals affirmed on all issues, except for calculation of state law meal break damages. The Court of Appeals held that "the retrieval and donning of protective equipment [were] 'integral and indispensable' preliminary activities, and, as such, [were] 'embrace[d]' by plaintiffs' 'principal [work] activity.'" Pet. App. 18a (quoting *Steiner v. Mitchell,* 350 U.S. 247, 252-53 (1956)). The Court of Appeals further held that walking time between the locker and work station was compensable because it occurred after the first principal activity of the workday and before the last principal activity of the workday. Pet. App. 18a-19a. The Court of Appeals reversed and remanded on state law meal break damages, holding that any meal break of less than 30 minutes had to be fully compensated, accepting arguments advanced by the Washington State Department of Labor & Industries as *amicus curiae.* Pet. App. 30a-32a & 34a. As a result, plaintiffs will recover $7.3 million on remand, all of it under state law. *See* Pet. App. 74a (District Court alternative damages findings).[6]

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[6] Therefore, this Court's ruling will not affect the judgment in this case, but it is likely to have modest collateral estoppel effects in *Chavez v. IBP,* Case #01-5093 (U.S. Dist. Ct. Eastern District of Washington), a case in which judgment has been entered against IBP's successors, Tyson Foods and Tyson Fresh Meats, Inc., on similar claims.

B. Statement of Facts.

1. Cattle Slaughter and Processing.

Plaintiffs are 815 slaughter and processing line workers at IBP's Pasco, Washington plant. Pet. App. 45a; *see* Pet. App. 35a & 75a. In slaughter, cattle are killed and hoisted onto a chain. Trial Tr. 2730:5-2731:23; *see* Pet. App. 36a. They then move along a series of chains where they are disassembled into carcasses and byproducts. Pet. App. 36a; *see* Pl. Exh. 46 (page IBP #02566, Trial Tr. 3027:17-23). A typical slaughter crew includes 178 slaughter workers in 113 job classifications, each of whom performs one or two discrete operations in the disassembly line process. Pet. App. 36a. Approximately 110 of the 178 slaughter workers (62%) use straight knives[7] or other handheld cutting utensils. Trial Tr. 2730:5-2859:23; Def. Exhs. 369 & 369a, *supra*. The carcasses are sent into a cooler where they are stored for at least 24 hours. Pet. App. 36a. The slaughter division is hot, with workers exposed to wet conditions and animal fluids. Trial Tr. 2685:4-15 & 2703:7-9 & 18-21. The slaughter division works one shift daily. Pet. App. 36a.

In processing, the carcasses emerge from the cooler and move along a series of chains and belts. *See* Pet. App. 36a. There are two processing shifts, each with approximately 400 workers in 135 job classifications. Pet. App. 36a. Saw operators and knife users drop primal cuts onto eight processing floor lines, each of which is a separate department with 25 to 40 workers working side-by-side

[7] "Straight knives" is used to distinguish hand-held knives from mechanical air knives or whizard knives. *See, e.g.*, Trial Tr. 2766:12-17.

along a belt on each shift. *See* Pet. App. 36a; Exhibit 370, *supra*; Pl. Exh. 46, *supra* (IBP #2567-2571).[8]

There are 624 processing line workers between the cooler and the end of the belts – 312 on each of two shifts – and 98% of them use straight knives (578) or large power saws (32). Trial Tr. 3012:9-3104:8; 3012:9-3197:12; 3250:8-20 & 32; 3252:19-25; 3253:18-20 & 3254:13-3255:1 (processing superintendent) & Def. Exhs. 370 & 371A-D, *supra* (processing and cooler department 715 charts). At the end of the belts there are 34 packaging workers who grab the pieces of meat with their meat hooks and put them into bags. Pet. App. 36a.; Def. Exh. 370, *supra*; Trial Tr. 1337:3-8. Two lightly-staffed departments – bones and hamburger – were located to the side of the processing floor. Pet. App. 36a; Def. Exh. 370B-D, *supra*.

2. Dangerous Work In A Sanitation-Sensitive Industry.

Meatpacking work is dangerous work. *See* Trial Tr. 911:18-912:15; Pl. Exh. 40, Trial Tr. 913:7-914:11. Workers use razor-sharp knives, operate power saws and use a variety of cutting tools. *See* Pl. Exhs. 174 & 175A-F, *supra*. As a result, OSHA and IBP require workers to use a wide array of protective equipment. *See* Trial Tr. 3618:1-9; Pl. Exhs. 90-93; Trial Tr. 3589:8-3590:24 & 3618:1-21 (Lochner, IBP fresh meat operations head). Failure to use required mesh aprons and mesh aprons with leggings was viewed as "life threatening" by IBP, while failure to use a required mesh glove, Kevlar glove, plexiglas armguard or required arm protection was viewed as creating a risk of "serious injury." Trial Tr. 911:18-912:15; Pl. Exh. 40, *supra*.

[8] The lines are named chuck, arm, rib, brisket/flank, loin, strip, bottom butt and rounds. Exhibit 370, *supra*.

Meatpacking is also subject to strict food safety standards, particularly after the Jack-in-the-Box hamburger meat e-coli outbreak in 1993. Trial Tr. 3587:10-14 & 3607:3-3608:3 (Lochner). All class members were required by the United States Department of Agriculture and IBP policy to wear a clean outer sanitary garment (with frocks used in processing and a white shirt in slaughter). Trial Tr. 3587:10-14 & 3594:12-25 (Lochner). In addition, the protective equipment and tools were required to be clean when stored in the locker rooms. *See* Pl. Exh. 48 (IBP #02643), Trial Tr. 1867:10-12 & 1868:8-12.

3. Required Locker Room Usage.

IBP required workers to store equipment and tools in the company-provided locker rooms. Pet. App. 39a. There were four locker rooms, one each for men and women in the slaughter division and in the processing division. Pet. App. 39a. All locker rooms were located in non-production areas far away from the work stations. *See, e.g.,* Pl. Exh. 174, *supra*. The processing locker rooms were located up two flights of narrow, crowded stairways. *Id.*

4. Equipment Usage.

IBP promulgated minimum required equipment lists for each job classification. *See* Pet. App. 39a & Pl. Exhs. 90-93, *supra*. The District Court further held that there were additional integral and indispensable equipment items beyond those listed on the required safety equipment lists. *See* J.A. 34-39.

As a rule, processing knife users – all 578 of them – were covered from shoulder to knee or ankle with a metal mesh apron or a metal mesh apron with leggings, metal mesh sleeves or Kevlar sleeves, a Kevlar glove on the knife hand, a metal mesh or Kevlar glove on the non-knife hand, a plexiglas armguard, and a scabbard and chain. See Pet. App. 40a & Pl. Exhs. 91-92, *supra*. The metal mesh

equipment is made of chain mail, *i.e.,* interlocked metal rings similar to that worn by medieval knights. *See* Pl. Exhs. 120M-P & 120BB, *supra*. It is heavy. *Id.* Kevlar is a modern protective fiber that is puncture resistant. *See* Pet. App. 40a; Trial Tr. 3625:7-14 (Lochner). Slaughter knife users were also required to use mesh aprons, mesh or Kevlar gloves, and, often, Kevlar sleeves. Pl. Exhs. 90 & 93, *supra*. Many knife users were required to wear weight belts, also known as a "comp vest" or "kidney belt." *See* Pet. App. 40a; Pl. Exhs. 90-93, *supra*; Pl. Exhs. 120Y-Z, *supra*. Knife users had steels. *See* J.A. 36; Pl. Exhs. 120X & 120AA, *supra*.

Air knife users and whizard operators typically were required to use a combination of plexiglas armguards, a weight belt, rubber gloves, a rubber apron, and, depending on the particular position, protective gloves and sleeves. Pl. Exhs. 90-93, *supra*, J.A. 37-39. Any worker whose work station was next to a knife, air knife or whizard knife user was required to use 2 Kevlar sleeves and 2 Kevlar gloves. Pl. Exhs. 90 (IBP #04008), 92 (IBP #04032), 93 (IBP #04046). Indeed, clean up workers assigned to a line and squeegee workers were required to wear mesh aprons, Kevlar gloves, and Kevlar sleeves because they moved around the production lines. *See* Pl. Exhs. 90-93. Packaging workers who bagged meat at the end of the processing belts used plastic sleeves, as well as meat hooks. J.A. 37; Trial Tr. 1536:6-8.

Cloth gloves were integral and indispensable in processing. Pet. App. 59a & J.A. 36. Workers could not grip safely without *clean* gloves, *i.e.,* blood and fat made the grip more difficult and less secure. *See* Pet. App. 59a. Cold hands made it more dangerous to use knives, saws and other types of cutting equipment on the processing floor which was between 38 and 42 degrees Fahrenheit. Pet. App. 40a & n. 4 & 59a. Many workers changed their gloves

multiple times a day, using as many as 12 to 16 cotton gloves. Pet. App. 59a; *see* Trial Tr. 1269:22-25 (Martinez).

All workers were required to wear a sanitary outer garment provided by IBP. Pet. App. 39a. All workers, except for the slaughter gutter job, were required to wear either safety glasses or a face shield. Pet. App. 39a. All workers were required to use a hard hat, ear plugs, and a hair net. Pet. App. 39a. Many workers wore weight belts to prevent back injuries. Pet. App. 40a. Employees also wore liquid repelling sleeves, aprons, and leggings, including yellow plastic sleeves, clear plastic sleeves, clear plastic leggings and rubber gloves and aprons. Pet. App. 40a.

5. Pre-Production Activities.

Slaughter workers began their workday by picking up supplies at the supply room, (*e.g.*, clean white shirts, protective sleeves, plastic sleeves and leggings) and then went to the locker room, where they retrieved their assigned protective equipment, steels, and tools. Pet. App. 40a. Most slaughter employees donned most of their safety equipment in the locker room. Pet. App. 40a. Straight knife users retrieved their knives from the knife room or from several distribution points on the slaughter floor. Pet. App. 40a. Air knife users retrieved their air knives from the knife room and wiped and washed grease from the air knives prior to use. *See* Pet. App. 40a.

Processing workers lined up to get their frocks and went up to the locker rooms. *See* Pet. App. 41a. They obtained safety equipment and tools, which IBP required to be stored in the lockers. Pet. App. 41a. They also needed to search for and find their glove pin, a very large safety-type pin which contained their daily-laundered cotton gloves, Kevlar gloves and Kevlar sleeves. *See* Pet. App. 41a & Trial Tr. 1243:8-15, 1244:20-1243:15, 1246:19-21 & 1250:9-1251:6. In the first shift, the glove pins were

brought into the cafeteria on a line-by-line basis in large sacks which were dumped out on cafeteria tables. *See id.* (Martinez) & J.A. 40. The workers crowded around the dumped glove pins and sorted through piles to locate their pin, identified by scratched initials or similar markings. *See id.* (Martinez); Pet. App. 53a. During the second shift, sacks with glove pins were hung and dumped in various locations throughout the plant, with workers gathering nearby to sort through and find their glove pins. *See* J. A. 40.

Straight knife users needed to sand their steels, a tool used to straighten the knife edge. *See* Pet. App. 42a. IBP provided squares of sandpaper at the knife rooms for this purpose. *See* Pet. App. 40a (slaughter); Trial Tr. 1247:21-1248:13 (processing). Steel sanding averaged 1.829 minutes per day. Pet. App. 57a n. 10 & 58a.

Employees were required to be at their work stations and ready to work on the cow or meat as it arrived on the chain. Pet. App. 40a.

6. Post-Production Activities.

After their last piece of meat, workers were required to clean their equipment and return it to the supply room (*e.g.* air knives) and to their lockers. *See* Pet. App. 41a. Knife users returned the knives to collection boxes. *Id.* In slaughter, the workers proceeded to wash stations and equipment sinks located on the slaughter floor, where they hosed down and scrubbed aprons, sleeves, rubber gloves and boots. *Id.* Processing workers lined up at equipment sinks and washed off their equipment, including scabbards, chains, mesh gloves, steels, plastic sleeves, aprons, meat hooks, scissors and boots. Pet. App. 42a & 57a (waiting time and washing time). Slaughter workers returned soiled Kevlar gloves, Kevlar sleeves and cotton gloves to the supply window, while processing workers clipped these items together and deposited them in bins.

See id. Soiled cotton frocks and whites were also returned to bins. *See id.* Workers doffed their remaining equipment upon returning to the locker room. Pet. App. 42a.

7. Gang Time Pay and Time Clock Usage.

Workers were paid on a gang time basis, *i.e.*, the paid day began when the first cow or carcass started on the chain and ended when the last cow or carcass started on the chain. *See* Pet. App. 36a-37a. Prior to the filing of this lawsuit, all pre-production, meal break and post-production work was done without pay. In July 1998, IBP began paying production line workers for 4 minutes of "clothes" time. *See* Pet. App. 39a & 78a.

Workers were required to swipe a time card through an electronic reader prior to production work and at the end of production work. *See* Pet. App. 37a & 47a. IBP instructed workers to clock in "'no more than 7 minutes before your scheduled start time,'" and to clock-out "'as you leave your work area.'" *See* Pet. App. 47a. However, the workers were not paid based on the time clocks. Pet. App. 47a.

8. Quantifying Off-the-Clock Work.

Workers arrived 15 to 45 minutes prior to production in slaughter and 30 to 45 minutes prior to production in processing. Pet. App. 49a; *see* Pet. App. 51a. The swipe card data bolstered this testimony. Pet. App. 51a; Pl. Exh. 179, Trial Tr. 2399:5-2400:12 (clocked in on average 30 to 50 minutes beyond paid workday). Based on this evidence, the District Court concluded it "could have determined that the evidence was sufficient to permit a more generalized damages calculation," but opted instead for individualized calculations "because the evidence and testimony permitted a more discrete determination as to timing by job description, equipment list, and activities testified to."

Pet. App. 45a-46a. It did this "in an overabundance of caution to the Defendant." Pet. App. 45a. The District Court found credible the donning, doffing and activity times testified to by plaintiffs' time study expert, Dr. Mericle, who time studied the most commonly used pieces of equipment and common activities. Pet. App. 49a-51a & 55a-58a. IBP had its own time study expert, Dr. Radwin, whose time study was called off after 3 days. Pet. App. 50a. The District Court also had before it other industrial engineers' time studies for the Pasco plant and two other IBP plants. Pet. App. 50a; *see also* Trial Tr. 3488:10-16 & 3497:4-3498:22 (IBP internal pre-production and post-production audits).

The District Court awarded the following pre-production and post-production donning and doffing minutes:

Equipment	put on:	take off:
mesh apron	.351	.172
mesh legging apron	.897	.233
scabbard	.264	.172
steel	.186	
mesh glove	.372	.113
polar sleeve [Kevlar]	.364	.081
plexiglas armguard	.091	.047
one mesh sleeve	.307	.095
double mesh sleeve	.473	.170
rubber apron	.492	.157
yellow plastic sleeve	.171	.071
clear plastic sleeve	.382	.109
rubber glove	.196	.077
clean cut glove [Kevlar]	.123	.165
cloth glove	.202	.070
weight belt	.279	.173
clear plastic legging	.586	.146

Pet. App. 56a-57a.[9] In addition, the District Court awarded the following pre-production and post-production walking and other activity minutes:

	kill:	process:
locker to work station (each way)	.962	1.653
walk to cafeteria to get gloves	1.061	
wait and dip scabbard and steel	.179	.179
wait for wash	.036	.571
wash and clean equipment	1.085	.853
clean and wash knives	.307	.307
clean saw	.482	.482
sand steel	1.829	1.829
wait and obtain gloves	.843	
handle equipment	.562	.562

Pet. App. 57a-58a.[10]

Processing division knife users – **the largest segment of the workforce** – recovered between approximately 12 and 14 pre-production and post-production minutes, including either 3.3 or 4.4 minutes of walking.[11] *See* Pet. App. 57a-58a; Pl. Exhs. 90-93, *supra* & J.A. 36-42. Processing saw operators recovered approximately 8 to 10 minutes, including 3.3 or 4.4 minutes of walking. The

[9] The District Court held non-compensable pre-production and post-production donning and doffing of hard hats, safety glasses, hair nets, ear plugs, rubber or safety boots, frocks, and whites. *See* Pet. App. 54a & 56a-57a. These pieces of equipment were held "not integral and indispensable to the job," involving *de minimis* time and/or subject to the FLSA §3(o), 29 U.S.C. §203(o) exclusion for "clothes changing" at union plants. *Id.*

[10] Getting and obtaining gloves was for processing, not slaughter. *See* J.A. 36 & 40. Additional walking to and from the cafeteria to get gloves was for first shift processing workers only. J.A. 40.

[11] All workers with pre-production and post-production minutes also had unpaid meal break donning and doffing.

various non-knife users – principally in hamburger and in packaging – recovered between 6 to 8 minutes, including 3.3 or 4.4 minutes of walking. *Id.* The relatively few processing workers who did not have compensable equipment, but who were required to go through the glove pin distribution procedure, recovered between either 1.387 minutes with zero walking time, or 2.448 minutes with 1.061 minutes of walking if they were on the first shift. J.A. 39 & 40; Pet. App. 57a-58a.

Slaughter straight knife users – 62% of slaughter workers – recovered between 9 and 10 minutes in pre-production and post-production damages, including 1.9 minutes of walking time. *See* Pl. Exhs. 90 & 93, *supra* & J.A. 38-39. Air knife and whizard operators recovered approximately 5½ to 6½ minutes pre-production and post-production, including 1.9 minutes of walking time. *See* Pl. Exhs. 90 & 93, *supra* & J.A. 38-39. Slaughter workers did not recover damages unless they had compensable pieces of equipment, *i.e.*, required equipment beyond the white shirt, hard hat, hair net, safety glasses, earplugs and boots. *See* J.A. 39-41, *see* Pet. App. 60a. Approximately 30 of 113 job classifications did not recover damages. *See* Exhibits 90 & 93 & J.A. 36-42 (additional equipment findings); Pet. App. 69a (citing Salter memo).

SUMMARY OF ARGUMENT

Section 4 of the Portal-to-Portal Act ("Portal Act"), reads very differently than Section 2 of the Act. Section 2 of the Act eliminated an employer's liabilities for claims prior to May 14, 1947, except for activities compensable by either contract or certain customs or practices. 29 U.S.C. §252(a). It was those claims which, had they not been

"outlawed," would have created "wholly unexpected liabilities, immense in amount, and retroactive in operation." *Steiner v. Mitchell*, 350 U.S. 247, 253, 255 (1956).

Section 4 of the Portal Act is a different and far more nuanced provision.[12] Section 4 only applies to activities "which occur either *prior* to the time on any particular workday at which such employee commences, or *subsequent* to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. §254(a) (emphasis added). Congress was thus (a) necessarily contemplating there being more than one principal activity, and (b) excluding from the reach of Section 4 all activities within the boundaries created by that provision. In *Steiner*, 350 U.S. at 252-53, 256, this Court construed what is "embraced" within the term "principal activity or activities." The combined result of the language and construction is that post-1947 walking, riding, or traveling occurring between principal activities is not covered by the Portal Act.

In *Steiner,* the Court defined the issue to be decided as "whether workers in a battery plant must be paid as a part of their 'principal' activities for time incident to changing clothes at the beginning of the shift." 350 U.S. at 248. By giving an affirmative answer to this question, *Steiner* established that the clothes changing was a "'principal' activit[y]" because it was integral and indispensable to a principal activity.

Plaintiffs' arguments are buttressed by the interpretive regulations of the Portal Act issued by the Administrator of the Wage and Hour Division, which were

[12] In the context of this case, if Section 2 were analogized to splitting a carcass in half, Section 4 would be more analogous to trimming the fat off of a piece of meat.

published in the Federal Register on November 18, 1947 shortly after the adoption of the Act. All parties to this appeal agree that Congress in 1949 "ratified" those regulations. The interpretive regulations explain that "workday" in the Portal Act generally means "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *See* 29 C.F.R. §790.6(b). Moreover, that same subsection explains that the workday "includes all time within the period whether or not the employee engages in work throughout all of that period." *Id.* Another interpretive provision establishes that walking, riding or traveling (as well as preliminary or postliminary activities not specified in §254(a)) are not covered by the Portal Act unless they take place before or after the performance of *all* of the employee's principal activities in the workday. 29 C.F.R. §790.4. Yet another interpretive provision makes clear that walking, riding or traveling in §4(a) does not include "travel from the place of performance of one principal activity to the place of performance of another" such activity. 29 C.F.R. §790.7(c). Each of those provisions directly supports the Ninth Circuit's opinion in this case.

The history and purpose of the Portal Act demonstrates that for work done after the passage of the Act, Congress intended to exclude only walking and some other pre- and post-shift activities that take place before and after the workday. It is therefore consistent with the purposes of the Portal Act for walking time during the workday to be compensable. The Senate Report of the bill, which largely became Section 4 of the Portal Act, defined the statutory term "workday":

> to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity

> or activities which such employee was employed to perform.

S. Rep. No. 80-48, p. 47.

Contrary to petitioner's argument, the Ninth Circuit's interpretation of §254 does not create new liabilities or windfall payments to employees. Ten years before plaintiffs filed this lawsuit, IBP was already in litigation with the Secretary of Labor in other meat packing facilities on issues including walking time during the workday. Nor can paying workers consistently with the plain meaning of the Portal Act and the Secretary of Labor's interpretation of the Portal Act be construed as providing them with a windfall. To the contrary, including this work as a cost of business, as Congress intended, brings economic efficiency and rationality to such activities.

ARGUMENT

A. Plain Meaning Supports Plaintiffs' Position.

1. §4(a) of the Portal Act.

The plain terms of §4(a) of the Portal Act only exclude from compensable time those activities which occur before an employee begins his or her *first* principal activity or after the employee ends his or her *last* principal activity. Section 4(a) excludes from compensable hours worked *only* those activities which occur "either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases" his or her principal activities. It follows, therefore, that any activity occurring between the employee's first and last principal activities, including walking time, is unaffected by the Portal Act.

Plaintiffs' reading of the "plain meaning" of that language is shared by the Secretary of Labor who, after quoting it, reasoned:

> Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application.

29 C.F.R. §790.6(a).

Several other relevant conclusions can be gleaned from the plain meaning of 29 U.S.C. §254(a). First, since that section repeatedly refers to "principal activity *or activities*", Congress necessarily contemplated that there may be more than one principal activity. Plaintiffs cannot improve on the Secretary of Labor's analysis:

> The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday.

29 C.F.R. §790.8(a). This Court should reject any interpretation of §254, which ignores the phrase "or activities" or would render it superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (judges should hesitate to treat as superfluous statutory terms in any setting).

Secondly, the grammar and structure of §4(a) of the Portal Act demonstrate that the phrase "which occurs either prior to the time on any particular workday at

which such employee commences, or subsequent to the time on which he ceases *such principal activity or activities,*" modifies both subsection (a)(1) and (a)(2) of that section. That too is how the Secretary of Labor has construed the "walking, riding, or traveling" portion of the statute. 29 C.F.R. §790.4(b)(1), (2). *See also Ralph v. Tidewater Construction Corp.*, 361 F.2d 806, 808-09 (4th Cir. 1966).[13] Thus, the interpretation of "principal activity or activities" set forth in *Steiner v. Mitchell*, 350 U.S. 247, 252, 256 (1955), applies *whenever* that phrase is used in §254. *See NCUA v. First National Bank*, 522 U.S. 479, 501 (1998) (similar language within the same section of a statute, must be accorded similar meaning); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000) (same).

2. "Principal Activity Or Activities."

This Court's interpretation of the term "principal activity or activities" in *Steiner v. Mitchell*,[14] *supra*, conflicts with both IBP's argument that donning and doffing cannot be a principal activity and its argument that plain meaning precludes analysis of legislative history. *Steiner* defined the issue decided therein as "whether workers in a battery plant must be paid as a part of their 'principal' activities for time incident to changing clothes at the

[13] While it argued to the Court of Appeals that §254(a)(1) is a "stand alone" provision (Pet. App. at 18a), IBP now appears to acknowledge that the §254(a)(1) walking time exclusion is limited to walking "'prior to the time on any particular workday, at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.'" Pet. Br. 15-16 (quoting statute).

[14] As held in *Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994), "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (Footnote omitted).

beginning of the shift." 350 U.S. at 248. By giving an affirmative answer to this question, *Steiner* establishes that the clothes changing was "'principal' activit[y]."

While IBP claims that the meaning of "principal activity" is plain, *Steiner* held that "[t]he language of Section 4 is not free from ambiguity and the legislative history of the Portal-to-Portal Act becomes of importance." 350 U.S. at 254. The Court not only considered, but appended to its opinion, excerpts from the legislative history of the Portal Act which showed that "'[t]he term "principal activity or activities" includes all activities which are an integral part thereof.'" *Steiner*, 350 U.S. at 257 (quoting Senator Cooper reading from page 48 of Senate Report). The Supreme Court in *Steiner*, using that legislative history and interpretive regulations of the Portal Act by the Secretary of Labor, agreed that "the term 'principal activity or activities' in Section 4 embraces all activities which are 'an integral and indispensable part of the principal activities.'" 350 U.S. at 252-53.

IBP's "plain meaning" argument focuses entirely on the word "activity" and ignores "or activities." It cites *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993), which interpreted a statute referring to "'*the principal place* of business for any trade or business of the taxpayer.'" 506 U.S. at 173 (emphasis added). Since "the principal place" is singular, this Court looked to the dictionary definition of "principal" and concluded that the "term 'principal' typically means 'most important, consequential or influential.'" 506 U.S. at 174. IBP argues from *Soliman*:

> Thus, an employee's "principal activity" is the most important or consequential task (or tasks) the employee was hired to accomplish. As applicable here, the "principal activity" respondents are "employed to perform" is processing meat, not changing clothes.

Pet. Br. 15. That argument does not work in the present case even if the term had not been defined in *Steiner* because §254 expressly contemplates several "principal activities." There is little point in determining what is the "most important" activity, when there are several principal activities. Moreover, this Court has already unanimously defined the term "principal activity or activities" as including "integral and indispensable parts of such activities." The meaning of that term has not changed in the past 50 years.

3. The Fair Labor Standards Amendments of 1949, §16(c).

In 1949, Congress "hear[d] from the [Wage and Hour] Administrator [about] his outstanding interpretation of the coverage of certain preparatory activities closely related to the principal activity and indispensable to its performance." *Steiner*, 350 U.S. at 255. Congress then expressly ratified the Administrator's then-existing regulations, including the Portal Act §4(a) interpretation. Fair Labor Standards Amendments of 1949, ch. 736, §16(c), 63 Stat. 920.[15]

[15] Section 16(c), as quoted in *Steiner*, 350 U.S. at 255, n. 8, states:

"Any order, regulations, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or any from time to time be amended, modified, or rescinded by the Administrator or

(Continued on following page)

The Secretary of Labor argued to the Court of Appeals herein that its position, *i.e.*, that the pre-production and post-production donning, doffing, cleaning and storing were compensable "integral and necessary" activities, was "compelled" by "the Secretary's longstanding, published interpretations of section 4(a) of the Portal Act, which were ratified by Congress in 1949," citing *Steiner,* 350 U.S. at 255 nn. 8-9 and 63 Stat. 920 (1949). Secretary of Labor *Alvarez v. IBP* Court of Appeals *Amicus* Brief at 8. IBP also agrees that the Secretary's interpretive regulations were "adopted shortly after passage of the Portal Act *and subsequently ratified by Congress.*" Pet. Br. 31 (emphasis added). *See also* Pet. Br. 30. "Ratify" means "to approve or confirm; especially, to give formal sanction to." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1496 (2d ed. 1983). As defined in BLACK'S LAW DICTIONARY 1268 (7th ed. 1999), "ratification" means "confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done."

Congress had known since at least this Court's decision in *Skidmore v. Swift & Co.*, 328 U.S. 134, 140 (1944), that, even without Congressional approval, interpretations by the Wage and Hour Administrator "while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." The significance of the Administrator's 1947 interpretive regulations is heightened because of the 1949 legislation in which the regulations were ratified by Congress.[16] In

the Secretary, as the case may be, in accordance with the provisions of this Act." 63 Stat. 920.

See also, 29 U.S.C.A. §208 (1998) (Historical and Statutory Notes).

[16] All of the interpretive language quoted by plaintiffs was published in the Federal Register on November 18, 1947 at 12 Federal

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Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969), this Court held that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *See also Loving v. United States*, 517 U.S. 748, 770 (1996) (same). Here, Congress, in 1949, after being advised about the Administrator's Portal Act regulations, ratified those then-existing Portal Act regulations. It is hardly surprising, therefore, that this Court specifically relied on 29 C.F.R. §790.8 in *Steiner*. 350 U.S. at 255 & n. 9. This Court should be loath to interpret §4(a) of the Portal Act in a way inconsistent with those congressionally-sanctioned interpretive regulations.

B. The Administrative Interpretation Of §4 of the Portal Act Supports Plaintiffs' Position.

1. The Lower Courts In This Case Correctly Applied the Portal Act Regulations in Holding Compensable Post-Donning and Pre-Doffing Walking.

Both the District Court and the Ninth Circuit relied on the agency's interpretive regulations in concluding that

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Register, pp. 7655-7699. At §790.1, the Secretary cites *Skidmore*, *supra*, and goes on to explain that:

> The interpretations expressed herein are based on studies of the intent, purpose and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

29 C.F.R. §790.1, n. 5. The operative provisions of 29 C.F.R. §790, as it was published in 1947, are appended to this Brief.

walking time after donning and before doffing was part of the workday and thus not subject to §4(a) of the Portal Act. For example, the Ninth Circuit cited 29 C.F.R. §790.6(b) as "noting that the 'workday' includes 'all time within that period whether or not the employee engages in work throughout all of that period.'" Pet. App. 18a. The District Court reasoned:

> The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time. 29 C.F.R. §790.6(b). Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy.

Pet. App. 54a. 29 C.F.R. §790.6(b) begins by explaining what the "workday" means in the Portal Act, stating:

> "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. *It includes all time within that period whether or not the employee engages in work throughout all of that period.*

(Emphasis added.) That directly supports plaintiffs' and the Ninth Circuit's position.

IBP's Brief, at page 31, ignores this more complete definition of "workday" in 790.6(b) and instead relies only on what the Secretary characterizes in §790.6(a) as a *rough* definition, to wit: "Section 4 of the Portal Act does not affect the compilation of hours worked within the 'workday' proper, *roughly described* as the period 'from whistle to whistle.'" (Emphasis added.) IBP's only

quotation of §790.6(b) in its "Agency Interpretive Guidance . . . " section is from a sentence in the middle of that paragraph that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there." Pet. Br. 31. That sentence is only a refinement of the general rule enunciated in the first two sentences of §790.6(b) quoted above.

IBP backhandedly acknowledges the general rule in the course of criticizing what it describes as an internal inconsistency in the Ninth Circuit's logic:

> As a result [of compensating for only "reasonable" walking time], the judgment effectively does provide compensation for "discrete periods," and is therefore flatly inconsistent with the notion, embodied in the regulation the lower court cited, *id.* at 18a, that the workday actually commences with the first integral and indispensable act, since employees must be paid for all time "within that [workday] whether or not the employee engages in work throughout all of that period." 29 C.F.R. §790.6(b).

Pet. Br. 38.

IBP is in effect arguing that the Ninth Circuit followed §790.6(b) in concluding that walking time after the first principal activity is not subject to the Portal Act, but failed to follow that same section by affirming the payment only of "reasonable" walking time. If IBP were correct, the logic of its argument would be to increase plaintiffs' damages, *i.e.*, reject the inconsistent portion of the opinion, rather than to reject the part which follows the regulation. *See* Pet. App. 18a. That of course is opposite to the result IBP is seeking. However, the Ninth Circuit affirmed "reasonable" walking time not as the standard of "hours worked," but as an appropriate reasonable approximation of damages under

Anderson v. Mt. Clemens Pottery, 38 U.S. 680, 688 (1946) and its progeny:

> Rather, the district court adopted – as the Tenth Circuit did in *Reich* [*v. IBP,* 38 F.3d at 1127] – a compensation measure based on a "reasonable" quantification of plaintiffs' work time, thereby avoiding countless individual plaintiff-specific quagmires while directing the parties to individualize the damage measure to the extent possible nevertheless.

Pet. App. 33a. The Ninth Circuit thus rejected plaintiffs' cross-appeal argument that "reasonable" time-studied segments were an improper measurement of damages because it failed to compensate for activities that were not time studied and for inefficiencies in the pre-production and post-production. *See, id.*

2. Additional Portions Of The 1947 Regulations, Ratified by Congress, Support Plaintiffs' and the Secretary of Labor's Workday Arguments.

The "Principal activities" subsection of the regulations, states: *"The term 'principal activities' includes all activities which are an integral part of a principal activity."* 29 C.F.R. §790.8(b) (emphasis added). Thus, the District Court's unchallenged findings that "donning, doffing, cleaning, and storage of required equipment, safety and otherwise, [was] integral and indispensable to the workers' duties as meat processors" (Pet. App. 58a) means that these activities were "principal activities" under §790.8(b).

To be excluded by §4(a) " 'walking, riding, or traveling' of the kind described in the statute" must "take place before or after the performance of all the employee's 'principal activities' in the workday." 29 C.F.R. §790.4(b). In the present case, however, the District Court made unchallenged findings that the walking between the locker

and the work station "occurs during the 'work day.'" Pet. App. 54a; *see id.* 40a, 58a & 59a.

Walking is defined as preliminary or postliminary activity. 29 C.F.R. §790.7(b); *see* 29 C.F.R. §790.7(f) (walking would "normally be considered preliminary or postliminary activities.") Thus, the limitations on what constitute "preliminary" or "postliminary" activities also apply to walking, riding or traveling, which are also treated as preliminary or postliminary activities. *See, e.g.*, 29 C.F.R. §790, n. 44. IBP's contrary argument in the last paragraph on page 31 of its brief conflicts with 29 C.F.R. §790.7(b).

Petitioner's Brief, at page 31, quotes part of 29 C.F.R. §790.7(c), but ignores the language underlined below which excludes from §4(a) all walking between the first and last principal activity.

> The statutory language and the legislative history indicate that the "walking, riding, or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. *It does not, however, include travel from the place of performance of one principal activity to the place of performance of another,* nor does it include travel during the employee's regular working hours. . . .

29 C.F.R. §790.7(c) (emphasis added). Thus, IBP's argument fails because it ignores the rule that travel between principal activities is compensable.

The sole ambiguity in the regulations comes in §790.7(g), footnote 49, which states that when clothes changing and washing is compensable,

> [t]his does not necessarily mean, however, that travel between the . . . clothes-changing place

> and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

This footnote recognizes a possibility that some travel incidental to clothes changing might be within the §4(a) exclusion. Correspondingly, it also means that other travel incidental to clothes changing is **not** subject to §4(a). The footnote offers no guidance or explanation.

The United States' *amicus* brief in *Tum*, at page 18, discusses the ambiguity in footnote 49 and concludes:

> At most, this passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act. . . .

The United States updates the agency's 58-year experience under 29 C.F.R. §790 and footnote 49, as follows:

> in the many years in which the Department has enforced the FLSA and the Portal Act, it has not issued any ruling identifying any circumstance in which such walking would be excluded from compensation under the Portal Act. . . .

Id. 20. The District Court in its findings, the Secretary in her Ninth Circuit *amicus* brief, and the Ninth Circuit saw no reason to treat the present case as an exception to basic §4(a) principles set forth in the statute, *Steiner* and the regulations.

Footnote 49 is ambiguous and should be analyzed within the context of 29 C.F.R. §790 as a whole. Courts

"must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *see Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its regulations as set forth in an amicus brief). Even apart from the weight of 29 C.F.R. §790, which supports plaintiffs' position herein, affirmance is also called for if the Secretary's interpretation is given any deference.

IBP and *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 280 (1st Cir. 2004) ignore the full scope of the regulations and do not give the Secretary's interpretation of this ambiguous footnote any deference.

3. The FLSA "Hours Worked" Regulations Support Treating The Walking In This Case As Compensable.

As explained in the 1947 regulations, there is a close relation between the Portal Act and the Fair Labor Standards Act. 29 C.F.R. §790.2. The Secretary of Labor has also issued hours worked regulations at 29 C.F.R. §785. Subsections 785.33-.41 discuss the compensability of travel time. These regulations were drafted to accommodate and be consistent with the Portal Act. *See* 29 C.F.R. §785.34. Subsection 785.38 is of particular relevance to this appeal, stating, in part:

> Where an employee is required to report at a *meeting place* to receive instructions or to perform other work there, *or to pick up and to carry tools*, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom or practice. . . .

(Emphasis added). Here, the findings of fact establish that the workers were required by IBP to report to their locker room to pick up and to carry tools, and to obtain required protective equipment. *See* Pet. App. 40a, 41a, 54a, 58a & 59a. Under this regulation, their travel from the locker room to the processing or slaughter floor "is part of the day's work, and must be counted as hours worked."

C. The Ninth Circuit Properly Applied *Steiner*.

The District Court found that IBP requires employees to "store equipment and tools in a company-provided locker at the end of each shift." Pet. App. 39a. It found that slaughter employees "go to the locker room, where they retrieve their assigned protective equipment, steels, and tools." *Id.* 40a. The District Court also found that processing employees go to their locker room where they "obtain safety equipment and tools, which IBP requires be stored in the lockers, and then proceed to the processing floor." *Id.* 41a. Based on those findings of fact, the District Court found and concluded, in light of 29 U.S.C. §254(a) and 29 C.F.R. §790.6(b), that:

> The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time. 29 C.F.R. §790.6(b). Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy. . . .

Id. 54a; *see also id.* 58a (concluding that "donning, doffing, cleaning and storage of required equipment, safety and

otherwise, are integral and indispensable to the workers' duties as meat processors") & *id.* 53a (quoting §4(a)).

The Ninth Circuit affirmed the District Court's analysis:

> The district court properly reasoned that the workday commenced with the performance of a preliminary activity that was "integral and indispensable" to the work, and the district court also properly determined that any activity occurring *thereafter* in the scope and course of employment was compensable. Thus, the district court included "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment" in its "compensable" time measure.

Pet. App. 18a (emphasis added.) In so doing, the Ninth Circuit relied on this Court's decision in *Steiner* as well as 29 U.S.C. §254 and 29 C.F.R. §790.6(b). The Ninth Circuit properly reasoned:

> *Steiner's* "principal activity" term expressly "embraces all activities . . . integral and indispensable" thereto, preliminary or otherwise, 350 U.S. at 252-53, 76 S.Ct. 330 (internal quotation marks omitted); the retrieval and donning of protective equipment are "integral and indispensable" preliminary activities, and, as such, are "embrace[d]" by plaintiffs' "principal [work] activity." *Id.* All activities performed thereafter – such as "walking" – thus occur during the "principal" workday and are compensable. *Id.; see also* 29 C.F.R. §790.6(b) (1999).

Pet. App. 18a. IBP asserts that the Ninth Circuit incorrectly reads *Steiner* as "equating 'integral and indispensable' activities with 'principal activities.'" Pet. Br. 18. IBP,

however, fails to acknowledge that this Court expressly agreed with this equation in *Steiner*:

> The Court of Appeals affirmed, likewise holding that the *term "principal activity or activities"* in Section 4 *embraces all activities which are "an integral and indispensable part of the principal activities,"* and that the activities in question fall within this category.
>
> *With this conclusion, we agree.*

350 U.S. at 252-53 (emphasis added; footnote omitted).

IBP makes several arguments as to why this Court could not have meant what it said. None is persuasive. IBP first argues that by:

> employing the concept of an "integral and indispensable" activity – a concept that does not appear in Section 4(a) itself – the Court necessarily recognized that the clothes-changing was not itself a principal activity.

Pet. Br. 18. Both parts of that argument are wrong. First, while the words "integral and indispensable" do not appear in §4(a), the concept that something which is integral and indispensable to an activity is part of the activity follows logically. For example, if batting a baseball is one of an employee's principal activities, it follows logically that batting embraces the activity of picking up a bat since that is an integral and indispensable activity for a batter. Secondly, the phrase "integral and indispensable" repeatedly appears in both the legislative history which this Court in *Steiner* appended to its opinion and in the Secretary of Labor's interpretive regulations which Congress ratified in 1949. This Court recognized the clothes changing in *Steiner* as a principal activity.

IBP next argues that if this Court, in *Steiner,* equated integral and indispensable activities with principal

activities, it would have been required to decide such questions as whether an activity could be an employee's principal activity even though it occurred in a locker room rather than on the production line. *Id.* at 18-19. However, both this Court and Congress in the legislative history attached to this Court's opinion, knew full well that an activity could be a principal activity even if not done on the "production floor."[17] Thus, there would have been no need to answer such a question in *Steiner*.

Third, IBP refers to this Court's language in *Steiner* that:

> We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and are not specifically excluded by §4(a)(1).*

350 U.S. at 256 (emphasis added). IBP argues that the emphasized portion of the quote means that the *Steiner* Court recognized:

> that Section 4(a)(1) continues to place pre- and post-shift walking time outside the FLSA's mandatory compensation requirements even when such walking occurs between other pre- and post-shift activities that are subject to mandatory compensation.

Pet. Br. 19 (footnote omitted). However, that argument is based on an incorrect reading of §4(a)(1) and *Steiner*. It

[17] *See*, for example, the question and answer between Senators Barkley and Cooper involving an employee spending half an hour sharpening and preparing tools prior to the start of production. 350 U.S. at 258-59.

assumes that §4(a)(1) covers *all* walking time between *all* principal activities. Section 4(a)(1) says no such thing. Rather, §4(a)(1), like §4(a)(2), is limited to certain activities (walking, riding or traveling), which occur "either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. §254(a). This Court's reference to §4(a)(1) in *Steiner* only underscores that a party can no longer successfully contend that walking, riding or traveling to the first principal activity is itself integral and indispensable to performing that first principal activity. *Accord*, 29 C.F.R. §790.4(b)(1) and §790.7(b); *see also* A.F.L-C.I.O *Tum/Alvarez Amicus* Brief 14-15.

At the same time, both the statute and the Secretary's regulations do not exclude from compensation a "preliminary" or "postliminary" activity *unless* such activity occurs "either prior to the time on any particular workday at which such employee *commences*, or subsequent to the time on any particular workday at which he *ceases*, such principal activity or activities." 29 U.S.C. §254(a); 29 C.F.R. §§790.6-790.8. Thus, the issue of whether the walking itself is integral and indispensable is irrelevant.[18]

Plaintiffs' position can be illustrated by *Mitchell v. King Packing Co.*, 350 U.S. 260 (1955). IBP acknowledges that the holding in *King Packing* was that "knife sharpening is a compensable '*principal*' activity of butchers in [a]

[18] Plaintiffs succeed in this appeal even if walking from one principal activity to another principal activity is *not itself a principal activity*. Neither the District Court nor the Ninth Circuit characterized the walking itself as a principal activity. Plaintiffs are aware that the petitioner in *Tum* has argued in the alternative that the walking in that case was itself a principal activity. While the *Alvarez* plaintiffs do not make that argument, if it is accepted, that would provide a separate basis for affirming the Ninth Circuit's decision.

meatpacking plant." Pet. Br. 17 n. 7 (emphasis added). In *King Packing,* knife sharpening was done by production workers in a separate "room, equipped by respondent with an emery wheel and grind stone" prior to or after their production work. 350 U.S. at 262. Since knife sharpening was, *as IBP admits*, a "principal activity," walking from the knife sharpening room to the room where the sharpened knives were used to cut meat would not fall within the confines of 29 U.S.C. §254(a).

D. The Legislative History And Purpose Of The Portal Act Show That Congress Was Legislating About Activities Outside Of The Workday And Was Not Legislating About Periods Within The Workday, Which The Legislative History Defines.

The Portal Act was prompted by this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) and the onslaught of litigation following it. *See Carter v. Panama Canal Co.*, 150 U.S. App. D.C. 198, 463 F.2d 1289 (D.C. Cir. 1972); S. Rep. No. 48, 80th Cong. 1st Sess. 47 (1947). As this Court recognized in *Steiner*, Congress responded very differently to past liabilities referenced in §2 of the Portal Act, than it did to future liabilities referenced in §4 of the Portal Act:

> On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities. Had Congress intended the result urged by petitioner, the very different provisions of §§2 and 4 would have been unnecessary; §2 could have been given prospective as well as retroactive effect.

350 U.S. at 255-56.

As to future liabilities, the legislative history strongly supports the conclusion that Congress was carefully and clearly (a) excluding from the Portal Act activities within the workday, (b) defining the workday as beginning with the first principal activity and ending with the last principal activity, and (c) defining principal activities as including all activities which are an integral and indispensable part of a principal activity.

Senate Report No. 48, 80th Cong. 1st Sess. 47 (1947), is particularly instructive because §4 of the Portal Act largely followed the Senate Bill. *Steiner*, 350 U.S. at 254. The Senate Report explained that the rules laid down in §4(a) related to activities taking place prior to or subsequent to the employee's principal activity or activities. It also explained that "workday" means:

> That period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform. Section 4 relieves an employer from liability or punishment under the FLSA on account of the failure of such employer to pay an employee minimum wages or overtime compensation, for activities of an employee engaged on or after 1947, *if such activities take place outside of the hours of the employee's workday*.

Id. at 46-47 (emphasis added). The Report further explained that "'principal activity or activities' include all activities which are an integral part thereof," and reiterates that "the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[] the beginning

and the end of his workday." S. Rep. No. 48, p. 48. The Senate Report also pointed out that:

> Activities of an employee which take place during the workday are . . . not affected by this section and such activities will continue to be compensable or not without regard to the provisions of this section.

S. Rep. 80-48, p. 47. Consequently:

> Any activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act.

Id. at 48. The Report was supplemented by remarks from the bill's sponsors. For example, Senator Cooper, a principal sponsor of the bill, explained,

> The rules which have already been developed by the Wage and Hour Administrator and the decisions of the courts still apply to that interval between the commencement of the employee's principal activity and the end thereof.

93 Cong. Rec. 2297 (1947). As aptly summarized in the A.F.L.-C.I.O.'s *Tum/Alvarez* Amicus Brief at page 11:

> In sum, as Senator Wiley put it, "[a]ctivities performed by an employee during the workday are not affected in any manner by [§4(a)]," 93 Cong. Rec. 4269, and as the Senate Report explained, the statutory term "workday" is defined "to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform," S. Rep. No. 48, p. 47.

The Administrator's contemporaneous reading of the legislative history and statutory language convinced the

Administrator that one of the two primary Congressional objectives in enacting Section 4 of the Portal Act was:

> (2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

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[20] Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270.

29 C.F.R. §790.4(a).

IBP's Brief cites relatively little of this history while making the unsupported argument that "Congress intended *all* pre- and post-shift walking to be uncompensated except pursuant to contract, custom or practice." Pet. Br. 21 (emphasis in original).[19] Thus, IBP is arguing that Congressional purpose was to exclude all time spent walking from one principal activity to another principal activity so long as such walking was not within the "shift" as defined unilaterally by the employer. As demonstrated by the above-quoted legislative history, Congress intended no such result.

It is also inaccurate to argue, as does IBP, that:

> The Portal Act Superseded This Court's Interpretations Of The FLSA, Including The Court's

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[19] Apparently, by pre-shift and post-shift walking, IBP is referring to *all* time when the workers are not cutting meat.

Conclusion That Walking And Traveling Time Are Compensable.

Pet. Br. 21. As the Court recognized in *Steiner*, Congress dealt with pre-1947 liabilities far differently in §2 than with post-1947 liabilities in §4 of the Portal Act.[20] IBP incorrectly equates "shift" with "activities." It quotes Senator Cooper as stating:

> that "clearly and definitely, as to the future, an employee cannot receive compensation for *any* walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. at 2297 (statement of Sen. Cooper) (emphasis added). . . .

Pet. Br. 24. However, that statement was accompanied by Senator Cooper's explanation that "'[t]he term' 'principal activity or activities' 'includes all activities which are an integral part thereof'" (giving examples that included pre-shift activities). 350 U.S. at 257 (legislative history).[21]

IBP argues:

> The purpose and history of the Portal Act foreclose any claim that Congress mandated compensation for walking that follows compensable clothes-donning or precedes compensable clothes-doffing.

Pet. Br. 26. This argument suffers from the same defect. The touchstone of the non-compensability of walking or traveling is whether it precedes the first principal activity or follows the last principal activity. *See* remarks of

[20] Surprisingly, IBP does not discuss §2 of the Portal Act or how it differs from §4 of the same Act.

[21] IBP at pages 25-26 of its Brief also cites earlier legislative history in which Senator Cooper proposed language that was not adopted. That is, of course, less persuasive than his later explanation of the language that was adopted.

Senator Cooper, 93 Cong. Rec. at 2297. In the context of this case, walking to the locker room where the first principal activity takes place is excluded under the Portal Act, but that exclusion does not apply to walking from one principal activity (at the locker room) to a second principal activity. Indeed, the Senate Report gives an example which necessarily includes compensable walking after the worker begins his or her first principal activity *prior to* the start of "shift," *i.e.*, production, work:

> "'2. In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.'"

Steiner, 350 U.S. at 257 (quoting Senator Cooper reading the Report in the floor debate). The Report, and Senator Cooper, in quoting the Report, necessarily understood that the employee's walking from bench-to-bench and machine-to-machine would be beyond the reach of the §4(a)(1) Portal Act exclusion, even though the walking occurs prior to start of production work.

E. Lower Court Authority Supports Compensation For Walking and Travel Time Between the First and Last Principal Activities, Even If Not Production Activity.

IBP relies on two lower court cases in which the trial courts held that walking and travel time did **not** take place between the first and last principal activities. Pet. Br. 15 (citing *Ralph v. Tidewater Construction Corp.*, 361 F.2d 806, 808 (4th Cir. 1966), and *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), *aff'g*, 314 F.Supp. 386

(D.D.C. 1970)). *Carter v. Panama Canal Co.* involved locomotive operators who paused to check an assignment board on the way to their locomotive. 463 F.2d at 1291. The trial court concluded that:

> passing an assignment board and walking 2 to 15 minutes to a locomotive is not an "integral part of and indispensable to" the principal activity of operating the locomotive.

314 F.Supp. 386, 391 (D.D.C. 1970). *Ralph v. Tidewater Construction Corp.* involved bridge tunnel construction workers who did *no work* before "transportation from the shore to their places of work in the Bay." 361 F.2d at 808. Travel prior to the first principal activity and after the last principal activity is non-compensable under §4(a)(1). Far more pertinent, however, are lower court cases in which the walking or travel occurred between the first and last principal activity, even though non-production activity.

Reich v. Monfort, Inc., 3 BNA Wage & Hour Cases 2d 1229 (D. Colo. 1996), *aff'd*, 144 F.3d 1329 (10th Cir. 1998), is directly on point. It involved unpaid donning, doffing, and cleaning work by cattle slaughter and processing employees. *The trial court distinguished Carter and held that walking from the locker room to the work stations and back was not subject to §4(a)(1) where it occurred between the first and last principal activities of the workday*, stating:

> The defendant contends that walk time should be excluded under the Portal-to-Portal Act, 29 U.S.C. §254(a)(1), *citing Carter v. Panama Canal Company*, 463 F.2d 1289 (D.C. Cir. 1972). That exclusion is not applicable here. The walk time from locker room to work stations is not separable from the time required for waiting in line at the knife room and the waiting and washing done at the wash stations on the way back to the locker rooms. . . .

3 BNA Wage & Hour Cases 2d at 1231. The Tenth Circuit affirmed, with the sole disputed issue being whether the pre-production and post-production work – with walking time included – was *de minimis*. *See* 144 F.3d at 1333.

In *Reich v. IBP*, 820 F.Supp. 1315 (D.Kan. 1993) (liability) (*"IBP I"*), *aff'd*, 38 F.3d 1123 (10th Cir. 1994) (*"IBP II"*), *on remand* 3 BNA Wage & Hour Cases 2d 324 (D.Kan. 1996) (damages) (*"IBP III"*), 3 BNA Wage & Hour Cases 2d 632 (D.Kan. 1996) (injunction) (*"IBP IV"*), *aff'd sub nom. Metzler v. IBP*, 127 F.3d 959 (10th Cir. 1997) (damages and injunction) (*"IBP V"*), the trial court held that walking time between the knife room and production floor was **not** excluded by §4(a)(1) because it occurred between the first and last principal activities of pre-production obtaining knives and post-production returning knives, stating:

> [T]he first principal activity for these employees was to pick up sharpened knives with which to perform their job on the production line. Therefore, the knife carrying employees' workday began and ended at the knife room because that was where the first and last principal activity occurred.
>
> We thus conclude that the time spent walking from the knife room to the work station and back to the knife room was compensable because it occurred during the workday. For clarity, we stress that the walk time was not compensable because the employees were carrying hand tools. *See* 29 C.F.R. §790.7(d) (carrying ordinary hand tools does not transform preliminary activity into a principle [*sic*] activity). Rather, the walk time is compensable because the workday was already underway. *See* 29 U.S.C. §254(a), 29 C.F.R. §§790.6, 790.7. . . .

Id. at 1325 (footnote omitted).[22] In *IBP V*, the Tenth Circuit characterized *IBP I* as follows:

> In phase one, the district court found that most of the activities performed by knife-wielding workers that related to the donning, doffing and cleaning of the specialized protective gear, the exchanging of dull knives for sharp ones, *and the time needed to walk to these activities, were compensable work under the Portal-to-Portal Act* of 1947, 29 U.S.C. §§216(b), 251-262. *Reich v. IBP*, 820 F.Supp. 1315, 1324-28 (D.Kan. 1993). . . . We affirmed the district court in all respects relevant to this appeal. *Reich I*, 38 F.3d at 1127-28. . . .

127 F.3d at 962 (emphasis added). The workers recovered 14 minutes of pre-production and post-production time, including "three minutes of pre-shift and post-shift compensable walk time." *Id.* at 962-63.

The Secretary of Labor's 1992 trial brief in *IBP I* is an exhibit herein. Pl. Exh. 1056 (Trial Tr. 4046:11-16). The Secretary argued:

> Because putting on and taking off work clothing and personal protective equipment are part of the employee's principal activity, (*see Steiner v. Mitchell, supra*; *Apperson v. Exxon Corporation*, 87 L.C. 48,932 (E.D. CA 1979, copy attached); all walking and waiting performed in between are also compensable. *See, Apperson v. Exxon Corporation, supra*; *Amos v. the United States*, 107 L.C. 45,255 . . . (Ct. Cl. 1987); *Dole v. Enduro Plumbing, Inc.*, 117 L.C. 47,058 (C.D. Cal. 1990) (copies attached);

[22] On the facts presented in that trial, the court found that the workday started at the knife room, rather than the locker room. The District Court here made a different factual finding. But both courts agreed that walking is compensable where it occurs between the first and last non-production principal activity.

> 29 CFR §§785.38, 790.6, 790.7. Furthermore this walking and waiting time are an integral and indispensable time of the employee's work activities.

Id.

In *Amos v. United States*, 13 Cl. Ct. 442, 449-50 (1987), prison cook foremen had to retrieve keys, a radio and a body alarm from a control room before going to the kitchen. The court held that retrieving these items was the first principal activity under §4(a) and that walking to the kitchen was therefore not subject to the §4(a)(1) exclusion, stating:

> [T]he walking time was more than a "preliminary" or "postliminary" activity under the regulations, 29 CFR §790.7(b), because it was closely related to and indispensable to the performance of their principal activity. 29 CFR §790.8(c).
>
> *Baylor* [*v. United States*, 198 Ct. Cl. 331 (1972)], *Whelan Security* [*Co. v. United States*, 7 Cl. Ct. 496 (1985)], and *International Business Investments, Inc.* [*v. United States*, 11 Cl. Ct. 588 (1987)] although factually distinguishable from the instant case, in principle support the conclusion reached here. In each of those three cases, the plaintiffs first had to report to a location other than their duty stations in order to obtain weapons, which were items necessary to their function as guards, prior to proceeding to their active duty stations. They were not free to take a route directly to their work places. Similarly, these plaintiffs must first go to the control room to obtain items necessary to performance of their job as cook foremen. . . .

Id. at 449-50; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50 (8th Cir. 1984) ("principal activities" is to be construed broadly); *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 398 (5th Cir. 1976) (same); *Dooley v. Liberty Mut. Ins. Co.*, 307 F.Supp.2d 234, 242 (D. Mass. 2004) (same).

As in *Monfort* and *IBP I* – and unlike *Ralph* or *Carter* – the present case involves District Court findings that the workers engaged in compensable principal activities prior to and after the walking time at issue. Lower court authority supports treating walking time between the first and last principal activities (even for non-production activities) as not being subject to the §4(a)(1) Portal Act exclusion.

F. The District Court and Court of Appeals Walking Time Ruling Is a Reasonable and Practical Analysis of the Paid Workday.

IBP argues that an "automatic rule" that any "integral and indispensable" activity starts the workday would lead to a host of anomalous results. Pet. Br. 32-39. IBP's "chief anomaly" is that walking time "would depend on the fortuity of where compensable gear happens to be located." Pet. Br. 32. However, the location of gear and other stations of "integral and indispensable" pre-production and post-production activities is not fortuitous, *i.e.*, left to chance.

IBP knows how to achieve efficiencies when it has to pay for the workers' time. It became the world's largest supplier of premium beef and pork by creating highly-efficient disassembly plants that started with cattle and finished with boxed beef. *See* Pl. Exh. 47 (IBP #0285-0286),

Trial Tr. 1870:20-25 & 1873:14-19.[23] Yet, prior to its extended FLSA litigation with the United States Secretary of Labor in the late 1980s and through the 1990s, *see* citations *supra,* IBP failed to apply principles of efficiency to pre-production and post-production activities at its plants. Thus, for the 1986-1988 period, IBP was held liable for knife users at 11 plants for having to wait in lines at the knife room, walk to and from the knife room with their knives pre- and post-shift, walk to equipment sinks post-production, and then wait in lines at the equipment sinks. *IBP I,* 820 F.Supp. at 1325; *IBP III,* 3 BNA Wage & Hour Cases 2d at 328; *IBP IV,* 3 BNA Wage & Hour Cases 2d at 632-33 & n. 1; *IBP V,* 127 F.3d at 965. These employees recovered 14 minutes, including 3 minutes of compensable walking from the knife room to the production floor and from the production floor to equipment sinks and the knife room. *IBP III,* 3 BNA Wage & Hour Cases 2d at 329; *IBP IV,* 3 BNA Wage & Hour Cases 2d at 632-33 n. 1; *IBP V,* 127 F.3d at 962-963. Following the liability findings in *Reich v. IBP,* the company "re-engineered" these 11 plants to eliminate or reduce certain inefficiencies, *i.e.,* changes in knife distribution and additional equipment washing sinks. *See, IBP III,* 3 BNA Wage & Hour Cases 2d at 328; *IBP V,* 127 F.3d at 964-65.

This demonstrates that when IBP had to pay for pre-production and post-production inefficiencies, it applied its industrial engineering skills to the pre-production and post-production process and made it more efficient. Pre- and post-production "integral and indispensable" activities

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[23] IBP describes its success as "Mastering Fractions" – "a fraction of money here, a fraction there and a fraction elsewhere – small differences which add up to the BIG DIFFERENCE. . . ." Pl. Exh. 47 (IBP #02586), *supra*. That same mastery can be applied to reduce compensable pre-production and post-production time.

can be efficiently organized and not left to happenstance. IBP and other employers can apply their industrial engineering skills to reduce the amount of the necessary time to their benefit and the workers' benefit. *See also, Reich v. Monfort, supra,* 3 BNA Wage & Hour Cases 2d at 1231 (cattle plant compensable wait-to-wash time reduced during litigation by addition of equipment sinks).

By the time *Alvarez* was filed, knife distribution had been somewhat improved at the Pasco plant.[24] IBP also added some processing equipment wash sinks in 1998 or 1999.[25] These changes were the result of applying industrial engineering principles to pre-production and post-production work. However, there were other inefficiencies that could also have been easily eliminated, *e.g.*, dumping large bags of glove pins in the cafeteria. By paying a small group of workers to deliver glove pins to the work stations, IBP could eliminate 1.061 minutes of walking time and 0.843 minutes of rooting around through bags and piles of glove pins for the larger group of processing workers. Other efficiencies are undoubtedly possible.[26] Eventually, IBP may be able to bring full efficiencies to the pre-production, meal break and post-production activities, leaving it to pay for only basic donning and doffing of equipment. Market forces will drive these changes in the same manner as they have driven the method by which IBP starts with a cow and ends up with boxed beef and marketable byproducts.

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[24] Workers could obtain their knives from the knife room or from 4 or 5 bins brought out to the production floor. *See* Pet. App. 40a.

[25] Trial Tr. 2998:23-2999:22 (processing superintendent).

[26] At the time of trial, IBP was working on implementing alternatives to the steels that required maintenance. Trial Tr. 3159:6-3162:20.

IBP requires employees to store equipment and tools in the locker rooms. Pet. App. 54a. The location of the locker room is not fortuitous, but rather is part of the building's design. Processing shift workers spend several minutes each day walking up and down two narrow and crowded flights of stairs to retrieve and store equipment. While IBP does not have to pay for the walking time to the locker at the start of the workday and from the locker at the end of the workday, donning and doffing of substantial amounts of equipment and retrieval of tools occurs in these lockers by the direction of IBP and is part of the workday. The donning and doffing is integral and indispensable to the employee's work and thus starts the workday. If IBP can "reengineer" the location of the locker rooms or equipment and tool storage, that will shorten the employee's workday for the benefit of the employees and IBP. Neither the amount of work nor the reduction will be fortuitous.

IBP criticizes the lower court rulings for making pre-shift and post-shift walking time dependant on a single piece of equipment, using as its example a plexiglas armguard that takes 5½ seconds to don. Pet. Br. 35. This example only highlights the weakness in IBP's argument. There is not a single job classification in which a plexiglas armguard user does not also have substantial additional protective equipment and tools. *See* Pl. Exhs. 90-93, *supra* (minimum safety equipment requirements). The overwhelming majority of plexiglas armguard users were the hundreds of knife users who had the full complement of shoulder to knee or ankle mesh aprons, mesh or Kevlar sleeves, mesh and/or Kevlar gloves, and related gear. *See id.* Thus, the example chosen by IBP bears no relation to the realities of this litigation.

Equally important, the plexiglas armguard hypothetical illustrates why compensation is necessary. A plexiglas

armguard reduces the risk of serious injury to the arm and wrist from an errant razor-sharp knife, a powerful saw or some other cutting utensil. There could be serious consequences from not using a necessary plexiglas armguard. Necessary plexiglas armguard use is fairly characterized as integral and indispensable to principal activity. Moreover, there are time consequences that naturally flow from use, *e.g.*, needing to go to and from the locker to retrieve and store the equipment and waiting in line to wash it at shift's end.

While it is true that the District Court engaged in line drawing between compensable and non-compensable activity, its decision was carefully tailored and did not produce anomalous situations as IBP contends. All of the workers started off with required safety/sanitation equipment that must be stored in the lockers – the hard hats, safety glasses, ear plugs and hair nets. Virtually all of the workers had tools stored in their lockers without which they could not do their work (such as meat hooks, scissors and locks & tags).[27] Meanwhile, while several dozen workers in a workforce of slightly less than 1000 may have had relatively few pieces of equipment held compensable, the overwhelming majority of slaughter and processing workers had large amounts of compensable equipment due to their using or working in proximity to sharp knives and other dangerous cutting utensils and machinery.

IBP also argues that the District Court and Court of Appeals rulings will result in undue recordkeeping. Pet. Br. 36. However, this argument is not supported in the record and fails to recognize modern options available to employers. IBP could position swipe card readers or badge scanners at the points where the first and last principal

[27] *See, e.g.*, Pl. Exhs. 1000-1021 & 1023-1024 & 1027-1031, 1033-34 & 1039-1047, *supra* (witness equipment lists); *see also* Pl. Exhs. 90-93, *supra*.

activities occur. It could exercise additional controls to make sure the paid pre-production and post-production work is performed as efficiently as the paid production work. The burden of recordkeeping is far less in the 21st century.[28]

IBP argues that the variation in work routines produce an "incongruous disparate effect." Pet. Br. 34. It uses the example of employees who go first to their lockers and then to the supply window and employees who first go to the supply window and then to their lockers. *Id.* IBP argues employees who first go to their lockers "are compensated for traversing the distance between the locker room and the supply window, even if picking up only non-compensable items at the supply window, whereas walking the same distance in the reverse order is not compensable even if employees pick up compensable items at the supply window." *Id.* These examples have no applicability to the present case. Workers who are required to get compensable equipment from their lockers are paid for a straight-line, crow-flies walk from the locker to production floor, regardless of the manner in which they actually work, under the reasonable time damage calculations used herein. *See* Pet. App. 33a. In essence, the workers herein are being paid for irreducible core activities. Every worker with compensable equipment is required to retrieve and store it in his or her locker and, therefore, in some manner must walk from the locker to the work station prior to production and from the work station to the locker after production. They do not receive *extra* minutes even if their path or additional activities would support additional minutes. Employers who want to comply with the law and

[28] *See Saunders v. John Morrell & Co.*, 1 BNA Wage & Hour Cases 2d 879, 883 (N.D. Iowa 1991) ("sophisticated computerized timekeeping system makes it possible to keep track of small amounts of time" spent donning, doffing and washing equipment at slaughter plant).

remain competitive can obtain the same benefit as the District Court's damage award gave IBP by exercising control over the timing and sequence of pre-production and post-production compensable activities in the same manner that they control other compensable work time, *i.e.*, structure it as efficiently as possible.

The Court of Appeals ruling does not threaten to inundate industry with enormous or unforeseen liabilities. Indeed, the litigation over the past 15 years has been concentrated in the meatpacking industry because of the combination of two factors – (1) compensation based on gang time and (2) substantial pre- and post-production work due to safety and sanitation exigencies. The meat packing industry has been aware of these issues for more than 15 years and, therefore, it is not facing unforeseen liabilities. The issue before this Court – walking time between the first and last principal activity – is a manageable matter even in the context of the meatpacking industry and involves liabilities within the control of the employers to reduce or even eliminate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM RUTZICK*
KATHRYN GOATER
SCHROETER, GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

DAVID N. MARK
LAW OFFICE OF DAVID N. MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Counsel for Respondents

Counsel of Record

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APPENDIX A

26 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 –

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle

for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

APPENDIX B

Part 790, General Statement As To The Portal-To-Portal Act Of 1947 On The Fair Labor Standards Act Of 1938, Signed By Administrator, Wage And Hour Division, On November 12, 1947 And Published In The Federal Register On November 18, 1947. 12 Fed. Reg., pp. 7655-7669 (1947)

GENERAL

§ 790.1 Introductory statement.

(a) The Portal-to-Portal Act of 1947 was approved May 14, 1947.[1] It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,[2] the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these acts.

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[1] An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes. Public Law No. 49, 80th Cong., chapter 52, 1st sess.

[2] 52 Stat. 1060; as amended; 29 U.S.C. 201 et seq. In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this act, see footnote 17.

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length herein,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would seem desirable also that he make these conclusions

[3] Sections 790.23 through 790.29 of this part discuss briefly those provisions of the Portal Act which affect the operation or enforcement of the Fair Labor Standards Act only with respect to activities engaged in by employees before May 14, 1947. Since the so-called "good faith defense" against past claims is considered incidentally in the discussion of the similar provision for the future, no separate discussion of this provision is included in these sections.

known to persons affected by the law.[4] Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administrator believes to be correct[5] and which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is incorrect. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it.[6] As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained herein.

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[4] See Skidmore v. Swift & Co., 323 U.S. 134; Kirschbaum Co. v. Walling, 316 U. S. 517; Portal-to-Portal Act, sec. 10.

[5] The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

[6] Skidmore v. Swift & Co., 323 U.S. 134. See also Roland Electrical Co. v. Walling, 326 U.S. 657; United States v. American Trucking Assn., 310 U.S. 534; Overnight Motor Transp. Co. v. Missel, 316 U.S. 572.

§ 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interelated parts of the entire statutory scheme for the establishment of basic fair labor standards.[7] The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.[8] But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy.[9] The Congressional declaration of

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[7] As appears more fully in the following sections of this part, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provisions of the Fair Labor Standards Act. Section 13 of the Portal Act provides that the terms, "employer," "employee," and "wage", when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter act.

[8] Portal Act, sections 1, 2, 4, 6, 9, 10, 11, 12.

Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch and Ferguson, 1947 Cong. Rec. 2168; colloquy between Senators Donnell and Ferguson, 1947 Cong. Rec. 2198; statement of Representative Gwynne, 1947 Cong. Rec. 1614.

[9] See references to this policy at page 5 of the Senate Committee Report on the bill (Senate Rept. 48, 80th Cong., 1st sess.), and in

(Continued on following page)

policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein.[10] Sponsors of the legislation in both Houses of Congress asserted that it "in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act"[11] that it "protects the legitimate claims" under that act,[12] and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act.[13] It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are

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statement of Senator Donnell, 1947 Cong. Rec. 2251; see also statement of Senator Morse, 1947 Cong. Rec. 2349; statement of Representative Walter, 1947 Cong. Rec. 4514.

[10] Cf. House Rept. No. 71; Senate Rept. No. 48; House (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 1947 Cong. Rec. 4516; statement of Senator Wiley, 1947 Cong. Rec. 4398; statement of Representative Gwynne, 1947 Cong. Rec. 1629; statements of Senator Donnell, 1947 Cong. Rec. 2204-2206; 2251-2252; statement of Representative Robsion, 1947 Cong. Rec. 1553; Message of the President to Congress, May 14, 1947 on approval of the act.

[11] Statements of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398 and 4501. See also statement of Senator Cooper, 1947 Cong. Rec. 2373; statement of Representative Robsion, 1947 Cong. Rec. 1553.

[12] Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4516. See also statement of Representative Keating, 1947 Cong. Rec. 1566.

[13] Statement of Senator Cooper, 1947 Cong. Rec. 2378; see also statements of Senator Donnell, 1947 Cong. Rec. 2439, 2440, 2442, statements of Representatives Walter and Robsion, 1947 Cong. Rec. 1550, 1552.

to be given a liberal interpretation[14] and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.[15]

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is effected in certain respects by the 1947 Act. The provisions of the Portal Act do not directly affect the provisions of section 15(a)(1) of the Fair Labor Standards Act banning shipments in interstate commerce of "hot" goods produced by employees not paid in accordance with the act's requirements, or the provisions of section 11(c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in any way the provision in section 15(a)(3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12(a) of the act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered in herein in connection with the discussion of specific provisions of the 1947 Act.

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[14] Roland Electrical Co. v. Walling, 326 U.S. 657; United States v. Rosenwasser, 323 U.S. 360; Brooklyn Savings Bank v. O'Neil, 324 U.S. 697.

[15] See A.H. Phillips Co. v. Walling, 324 U.S. 490; Walling v. General Industries Co., 67 S. Ct. 883.

§ 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1947, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances, such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were: (1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in

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[16] The Fair Labor Standards Act requires payment of a minimum wage of not less than 40 cents an hour for all hours worked (except to certain learners, apprentices, handicapped workers, and messengers, and in certain industries in Puerto Rico and the Virgin Islands), and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employee's regular rate of pay.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation, together with an additional equal amount (subject to section 11 of the Portal-to-Portal Act, discussed below in § 790.22) as liquidated damages (section 16(b) of the act); and, if his act or omission is willful, subjects him to criminal penalties (section 16(a) of the act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the act).

the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable worktime, independently of contract, custom, or practice;[19] and (2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in "physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (Tennessee Coal Iron & R.R. Co. v. Muscoda Local, 321 U.S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323, U.S. 134, 136-137).

[19] Portal Act, section 1; Senate Report, pp. 41, 42, 46-49; Conference Report, pp. 12, 13; statements of Senator Wiley, 1947 Cong. Rec. 4154, 4398; statements of Senator Donnell, 1947 Cong. Rec. 2159, 2192, 2193, 2255, 2256, 2440, 2441; statements of Senator Cooper, 1947 Cong Rec. 2370-2377.

[20] Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256, 2440; statements of Senator Cooper, 1947 Cong. Rec. 2371, 2374, 2375, 2376-2377, 2378; statement of Representative Gwynne, 1947 Cong. Rec. 4513; statements of Senator Wiley, 1947, Cong. Rec. 2154, 4398.

therefor if, and only if, such activities meet the following three tests:

(1) They constitute "walking, riding, or traveling" of the kind described in the statute, or other activities "preliminary" or "postliminary" to the "principal activity or activities" which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's "principal activities" in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that "the employer shall not be so relieved" if such activities are so compensable;[21] it does not matter in such a situation that they are so-called "portal-to-portal" activities.[22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an

[21] Section 4(b) of the act (quoted in § 790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2255-2256; colloquy between Senators Cooper and Mcrath, 1947 Cong. Rec. 2376; Cf. colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for;[23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.[24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, "preliminary" or "postliminary" activities which take place outside the workday "before the morning whistle" or "after the evening whistle" are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day.[25]

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[23] Statements of Senator Donnell, 1947, Cong. Rec. 2253, 2255, 2256; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2376.

[24] Statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256.

[25] Conference Report, pp. 12, 13. See also § 790.12.

§ 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

* * * in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4(b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such "preliminary" or "postliminary" activities, performed before or after the employee's "principal activities" for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of

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[26] The full text of section 4 of the act is set forth in § 790.3.

[27] See § 709.6.

Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel

[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10.

which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

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§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the

[32] Cf. colloquies between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253, 2255, 2256; colloquy between Senators Ellender and Cooper, 1947 Cong. Rec. 2374; colloquy between Senators McGrath and Cooper, 1947 Cong. Rec. 2376. See also Senate Report, p. 48.

[33] See §§ 790.3 and 790.12; Conference Report pp. 12, 13. See also Senate Report, p. 48.

[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they "occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases" the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398 (also 2154, 2155); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4513; statements of Senator Cooper, 1947 Cong. Rec. 2371, 2374-2377; statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256, 2440.

[36] See, in this connection, statements of Senator Cooper, 1947 Cong. Rec. 2373-2374, 2376-2377; statements of Senator Donnell, 1947 Cong. Rec. 2255-2256, 2440; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398. See also footnote 18.

(Continued on following page)

concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the

The determination of hours worked under the Fair Labor Standards Act is the subject of a separate interpretative bulletin, No. 13, which will be republished in revised from as Part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398. See also the discussion in §§ 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statements of Senator Donnell, 1947 Cong. Rec. 2440; statements of Senator Cooper, 1947 Cong. Rec. 2375-76.

workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregard [sic], and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary"

[39] Colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375, 2376.

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 1947 Cong. Rec. 2253, 2255, 2256; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2376. See also §§ 790.4 and 790.5.

activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4513. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 1947 Cong. Rec. 2255, 2440.

or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In

[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection, the statements of Senator Donnell, 1947 Cong. Rec. 2192, 2255, 2256, 2441; statement of Senator Cooper, 1947 Cong. Rec. 2374. See also Senate Report, pp. 47, 48.

[45] The Report of the Senate Judiciary Committee (p. 48) emphasized that this section of the act "does not attempt to cover by specific language the many thousands of situations that do not readily fall within the pattern of the ordinary workday."

situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or

[46] These principles will be discussed in Part 785 of this chapter, which will replace Interpretative Bulletin No. 13.

[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employed." (Emphasis supplied.) 1947 Cong. Rec. 2377.

other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, "actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However, where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has no significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

[48] See Senate Report, p. 47; statements of Senator Donnell, 1947 Cong. Rec. 2192, 2255, 2441.

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

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§ 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to

[51] Colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375-6.

[52] See Skidmore v. Swift & Co., 323 U.S. 134, 7 WHR 1165.

[53] See §§ 790.4 through 790.6; also Part 785 of this chapter, which will replace Interpretative Bulletin No. 13 as a statement of the principles for determining hours worked under the Fair Labor Standards Act.

[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "Principal" activities referred to in the statute are activities which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee

[55] Cf. Edward F. Allison Co., Inc. v. Commissioner of Internal Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 1947 Cong. Rec. 2374.

[58] Remarks of Representatives Walter, 1947 Cong. Rec. 4515. See also statements of Senator Cooper, 1947 Cong. Rec. 2375, 2377.

[59] See statements of Senator Cooper, 1947 Cong. Rec. 2374-2377. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947.

which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

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[60] See statement of Senator Cooper, 1947 Cong. Rec. 2377.

[61] Senate Report, p. 48; statements of Senator Cooper, 1947 Cong. Rec. 2375-2377.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (1947 Cong. Rec. 4513) and by Senator Wiley in the Senate (1947 Cong. Rec. 4501), the language of the provision here involved follows that of the Senate bill.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity

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[63] Statement of Senator Cooper, 1947 Cong. Rec. 2375; colloquy between Senators Barkley and Cooper, 1947 Cong. Rec. 2428. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 1947 Cong. Rec. 2375, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 1947 Cong. Rec. 2375, 2377; colloquy between Senators Barkley and Cooper, 1947 Cong. Rec. 2428.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375.

rather than a principal part of the activity.[66] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

[67] See Senate Report, p. 47; statements of Senator Donnell, 1947 Cong. Rec. 2383, 2440; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2375.

APPENDIX C

Part 785 and Title 29 of the Code of Federal Regulations provides, in relevant part:

Subpart B – Principles For Determination Of Hours Worked

§ 785.9 Statutory exemptions.

(a) The Portal-to-Portal Act. The Portal-to-Portal Act (secs. 1-13, 61 Stat. 84-89, 29 U.S.C. 251-262) eliminates from working time certain travel and walking time and other similar "preliminary" and "postliminary" activities performed "prior" or "subsequent" to the "workday" that are not made compensable by contract, custom, or practice. It should be noted that "preliminary" activities do not include "principal" activities. See §§ 790.6 to 790.8 of this chapter. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the "workday". "Workday" in general, means the period between "the time on any particular workday at which such employee commences (his) principal activity or activities" and "the time on any particular workday at which he ceases such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his "principal" activities. With respect to time spent in any "preliminary" or "postliminary" activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The "preliminary" or "postliminary" activity

in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted. If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes. (*Galvin v. National Biscuit Co.*, 82 F. Supp. 535 (S.D.N.Y. 1949) appeal dismissed, 177 F. 2d 963 (C.A. 2, 1949))

(b) Section 3(o) of the Fair Labor Standards Act. Section 3(o) gives statutory effect, as explained in § 785.26, to the exclusion from measured working time of certain clothes-changing and washing time at the beginning or the end of the workday by the parties to collective bargaining agreements.

Subpart C – Application Of Principles

§ 785.24 Principles noted in Portal-to-Portal Bulletin.

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, § 790.8(b) and (c) of this chapter said:

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

> (1) In connection with the operation of a lathe, an employee will frequently, at the commencement of

> his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.
>
> (2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary' or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

Traveltime

§ 785.33 General.

The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved. The subject is discussed in §§ 785.35 to 785.41, which are preceded by a brief discussion in § 785.34 of the Portal-to-Portal Act as it applies to traveltime.

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§ 785.34 Effect of section 4 of the Portal-to-Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in

computing hours worked. However, ordinary travel from home to work (see § 785.35) need not be counted as hours worked even if the employer agrees to pay for it. (See *Tennessee Coal, Iron & RR. Co. v. Muscoda Local*, 321 U.S. 590 (1946); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 690 (1946); *Walling v. Anaconda Copper Mining Co.*, 66 F. Supp. 913 (D. Mont. (1946).)

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§ 785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C. A. 10, 1944))

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(12)

No. 03-1238

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IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

MICHAEL J. MUELLER
JOEL M. COHN
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
NORINA IRANI EDELMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

September 6, 2005

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INTRODUCTION

In its opening brief, petitioner demonstrated that Section 4(a)(1) applies, by its plain terms, to the walking time at issue in this case: it excludes from the mandatory compensation requirements of the Fair Labor Standards Act ("FLSA") all time respondents spend walking "to and from" their work stations, which is the "actual place of performance of the principal activity or activities [they are] employed to perform," *i.e.*, meat processing. 29 U.S.C. § 254(a)(1). Nevertheless, respondents and the government contend that this Court dictated a contrary result 50 years ago, in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). *Steiner*, they claim, necessarily held that, when integral and indispensable to a principal activity, clothes-changing is itself a principal activity that triggers the start of the workday, thereby rendering all subsequent walking compensable.

This central theory is mistaken. *Steiner* involved the scope of Section (a)(2) and the meaning of the terms "preliminary" and "postliminary," not the scope of subsection (a)(1). Indeed, the precise holding in that case identified periods of pre- and post-shift time that necessarily included the very time at issue here—time between compensable clothes-changing and the work station—and stated such time was not mandatorily compensable if excluded by subsection 4(a)(1). Thus, *Steiner* does not announce the rigid rule respondents and the government advocate.

Respondents' rule, moreover, cannot be reconciled with a long-standing regulation that acknowledges that, even where clothes-changing is mandatorily compensable, time spent walking between the locker room and the work station is not. Nor can it be reconciled with even older pronouncements, in which the government long ago recognized that compensable activities may occur outside the workday. And, as petitioner has shown, respondents' rigid approach leads to anomalies that Congress could never have intended.

In short, respondents and the government have failed to refute petitioner's showing that the decision below should be reversed.

I. TIME SPENT WALKING BETWEEN INTEGRAL AND INDISPENSABLE CLOTHES-CHANGING AND THE WORK STATION IS NOT COMPENSABLE UNDER SECTION 4(a) OF THE PORTAL ACT.

The text, purpose, and history of Section 4 of the Portal Act all point to the inescapable conclusion that the time employees spend walking between compensable pre- and post-shift clothes-changing and their actual work stations is not subject to mandatory compensation under the FLSA.

A. The Text Of Section 4(a)(1) Of The Portal Act Makes Clear That The Walking Time At Issue Here Is Not Compensable.

In determining statutory meaning, as this Court has "repeatedly held, the authoritative statement is the statutory text." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, — U.S. —, 125 S. Ct. 2611, 2626 (2005); *accord Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Although neither the Ninth Circuit below, nor respondents or their *amici*, confront the full text of Section 4(a)(1), that text makes plain that the walking time at issue here is not subject to mandatory compensation.

Section 4(a)(1) provides that "no employer shall be subject to any liability or punishment" for failure to compensate employees for:

> (1) walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform,
>
> . . .

> which occur[s] either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a).

This language resolves the question presented. The phrase "actual place of performance" necessarily refers to the place where the employee performs the important or consequential task (or tasks) he or she "is employed to perform." Pet. Br. 14-16.[1] Here, the "actual place" where respondents perform their "principal activity" of processing meat is the work station where they engage in that processing—not the locker room or cafeteria where they retrieve and don protective clothing. Under Section 4(a)(1)'s plain terms, therefore, the time respondents spend "walking . . . to and from" their work stations—the "actual place of performance of the principal activity or activities which [they are] employed to perform"—is excluded from mandatory compensation. 29 U.S.C. § 254(a)(1).

The government's contrary argument that the locker room is the actual place of performance makes no sense and unravels its textual argument. Specifically, the government suggests that, "[o]nce it is accepted that integral and indispensable donning and doffing are principal activi-

[1] Cases such as *Carter* v. *Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), and *Ralph* v. *Tidewater Construction Corp.*, 361 F.2d 806 (4th Cir. 1966)—although not involving compensable pre- and post-shift clothes-changing—adopt this plain meaning, observing that the "actual place of performance" of locomotive operators' principal activity "is the locomotive itself," not the assignment board they checked before walking to the locomotive, 463 F.2d at 1294, and that, for employees constructing a bridge, the "actual place of performance" was the bridge itself, not the dock where employees boarded a boat for daily rides to and from their work sites, 361 F.2d at 808-09. The definition of the term "actual place of performance" is not altered simply because an employee's arrival at that location is preceded by compensable pre-shift clothes-changing.

ties . . . , it necessarily follows that those activities occur in the actual place of performance of principal activities." U.S. Br. 16. But the government's premise ignores critical statutory text.[2] The fact that an activity, such as clothes-changing, is integral and indispensable to a principal activity, such as meat processing, does not mean that clothes-changing is itself "the principal activity or activities which [an] employee *is employed to perform*." Although the Ninth Circuit concluded that certain clothes-changing is integral and indispensable to respondents' principal activities, that conclusion (which this Court declined to review) does not alter the facts that respondents are not "employed to perform" clothes-changing, and that the locker room is not "the actual place of performance" of the activity for which they were hired.

For these same reasons, there is no merit to the government's related argument that there is "no textual anchor" for excluding pre- and post-shift walking time from the FLSA's mandatory compensation requirements. U.S. Br. 17. Use of the "shift" as a temporal dividing line—which is the concept the Court employed in *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956); see also *infra* at 6-8—simply reflects that, in many industrial settings, the activities during the shift are those "which [the] employee is employed to perform." 29 U.S.C. § 254(a)(1). While other activities outside the shift may be compensable, walking is not when it is "to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." *Id.*

Nor does respondents' suggestion that there may be more than one principal activity save their argument. See Resp. Br. 17-20. Petitioner has never denied that an employee may be hired to perform more than one principal activity. Indeed, the

[2] The government's argument also ignores its own regulations, which have long made clear that a locker room in which an employee engages in compensable clothes-changing is not the "actual place of performance of the principal activity . . . which such employee is employed to perform." *See infra* at 13-15.

text of the statute expressly refers to "principal activity or activities," and petitioner recognized that possibility in its opening brief. See, *e.g.*, Pet. Br. 15. But that phrase does not transform all integral and indispensable activities into the important and consequential tasks the employee "is employed to perform." To the contrary, the text simply acknowledges that an employee may be hired to perform more than one principal activity. For example, an employee might be hired to perform both the tasks of processing meat and cleaning saws for other employees. In such a circumstance, the employee was hired to perform two principal activities. To include all integral and indispensable tasks under this rubric, however, would turn the phrase "which such employee is employed to perform" into a meaningless tautology in which the statutory duty to compensate would determine what work the employer hired the employee to perform.

In short, regardless of whether respondents are entitled to compensation for certain pre- and post-shift clothes-changing activities, those activities occur before and after respondents' arrival at or departure from the "actual place of performance of the principal activity or activities" they are "employed to perform": meat processing. Accordingly, under the plain terms of Section (a)(1), such pre- and post-shift walking time is excluded from mandatory compensation and is thus compensable only as required by contract, custom, or practice. See also Chamber Br. 10-13 (explaining how the Portal Act was structured to encourage bargaining over walking time and other pre- and post-shift activities).

B. Nothing In *Steiner* Justifies Departing From The Plain Meaning Of Section 4(a)(1).

As petitioner previously demonstrated, this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), confirms that the walking time at issue here is not subject to mandatory compensation. See Pet. Br. 16-20. Respondents' reliance on *Steiner*—a case involving subsection 4(a)(2)—to foreclose the plain reading of subsection 4(a)(1) is unavailing.

Most notably, *Steiner* did not state that the employees who worked at the battery-producing plant in that case had two principal activities, clothes-changing and producing batteries, and thus more than one "actual place of performance" for these principal activities. Instead, the Court referred to the production of batteries as the employees' "principal activity," and noted that this activity occurred on the production line. 350 U.S. at 249, 251-52.

Nonetheless, respondents and the government rely on two passages in *Steiner* in an attempt to show that the Court meant that clothes-changing was itself a "principal activity," and not merely an activity that was compensable because it fell outside the scope of subsection (a)(2)'s exclusion of pre- and post-liminary activities. First, they cite the Court's statement of the issue: "whether workers in a battery plant must be paid as a part of their 'principal' activities for time incident to changing clothes at the beginning of the shift and showering at the end" or "whether these activities are 'preliminary' or 'postliminary' within the meaning of the Portal-to-Portal Act." *Id.* at 248; see Resp. Br. 18-19; U.S. Br. 13. Second, they rely on the Court's statement, at the outset of its analysis, that it agreed with the court of appeals that "'principal activity or activities' in Section 4 embraces all activities which are 'an integral and indispensable part of the principal activities,' and that the activities in question fall within this category." 350 U.S. at 252-53 (footnote omitted); see Resp. Br. 31; U.S. Br. 13.

Neither of these statements, however, reflects the holding in *Steiner*, which recognized a narrow exception to subsection (a)(2). Rather, the Court's actual holding was more precise:

> We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act *if* [1] those activities are an integral and indispensable part of the principal activities for which covered workmen

are employed *and* [2] are not specifically excluded by Section 4(a)(1).

350 U.S. at 256 (emphasis added); see Pet. Br. 16-20.

The first proviso reflects the Court's understanding that there are, on the one hand, "principal activities *for which covered workmen are employed*," and also, on the other hand, activities "integral and indispensable" to those principal activities. 350 U.S. at 256 (emphasis added). Thus, the Court understood that, whether or not they should be compensated for clothes-changing, the employees were not employed to change clothes. Rather, they were employed to produce batteries, which was their principal activity. This understanding is reflected on numerous occasions in the decision.[3] Because clothes-changing was "integral and indispensable" to this principal activity it was "compensable," but it was not itself transformed into a principal activity "for which covered workmen [were] employed." *Id.*

Moreover, recognizing that such pre-shift activities may be compensable does not mean that they necessarily trigger the workday rule. Had the Court understood that integral and indispensable activities commenced the workday, it could and would have said that all activities performed any time "before or after the regular work shift, on or off the production line," are compensable if they are integral and indispensable to a principal activity *or* occur after the first and before the last such integral and indispensable activity. Instead, it held that pre- and post-shift activities are compensable if they are

[3] *See* 350 U.S. at 249 (clothes-changing was integral and indispensable to "the production of batteries, *the 'principal activity' in which these employees were engaged*"); *id.* at 248 (clothes-changing and showering were "work performed before or after the *direct or productive labor for which the worker is primarily paid*"); *id.* at 251 (clothes-changing is indispensable "to the performance of their *productive work*"); *id.* at 255 (referring to "preparatory activities *closely related to* the principal activity and indispensable to its performance") (all emphases added).

integral and indispensable to a principal activity *and* not excluded by Section 4(a)(1). *Id.*

Respondents and the government argue that the second proviso "simply means that walking that precedes the first principal activity or follows the last principal activity cannot itself be a compensable principal activity based on the theory that it is an integral and indispensable part of those principal activities." U.S. Br. 17; see Resp. Br. 33 (Section 4(a)(1) "only underscores that a party can no longer successfully contend that walking, riding or traveling to the first principal activity is itself integral and indispensable to performing that first principal activity"). But that is *not* what *Steiner* says. The Court referred to activities that occurred "*before or after the regular work shift, on or off the production line*," 350 U.S. at 256 (emphasis added), not to activities that occurred "before or after the first or last principal activity." The Court's temporal specification inescapably includes walking that occurred between the clothes-changing place and the "shift" or "production line," and it therefore necessarily places the walking at issue here (no less than the walking from the plant gate to the clothes-changing place) outside the scope of mandatory compensation under the FLSA.

Thus, nothing in *Steiner* compels the conclusion that the walking time at issue here is subject to mandatory compensation under the FLSA.[4] To the contrary, *Steiner* supports petitioner's plain reading of the Portal Act as excluding the pre- and post-shift walking time at issue here.[5]

[4] Similarly, in reiterating *Steiner*'s core holding, *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), also recognized that, even if certain pre- and post-shift activities (such as knife sharpening) were compensable because they were integral and indispensable to the principal activity the employee was hired to perform, Section 4(a)(1) still excluded related pre- and post-shift walking time from mandatory compensation. *Id.* at 261.

[5] Respondents argue that this Court already has definitively concluded that Section 4 is ambiguous in all contexts. *See* Resp. Br. 19; *see also* U.S. Br. 12. The ambiguity *Steiner* identified, however, was whether, in

C. The History And Purpose Of The Portal Act Confirm That The Walking Time At Issue Here Is Not Compensable.

Although the Court does not need additional evidence to conclude that the walking time at issue here is not subject to mandatory compensation, the history of the Portal Act supports petitioner's reading of Section 4(a)(1). In this regard, it is noteworthy that respondents and their *amici* all but ignore the historical context in which Section 4 of the Portal Act was enacted. That history confirms that Congress intended all pre- and post-shift walking to be uncompensated except by contract, custom, or practice.

Notably, respondents virtually ignore *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)—"the famous case that launched the Portal-to-Portal legislation," *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1292-93 (D.C. Cir. 1972). In *Anderson*, having no congressional guidance, the Court reasoned (in striking similarity to the core rationale of the Ninth Circuit below) that pre- and post-shift walking time was entitled to compensation because, "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and the employees "walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business." 328 U.S. at 691. Respondents do not deny the resulting flood of litigation or that Congress responded quickly and decisively to rein in the effects of *Anderson*. See Pet. Br. 3-5, 21-26.

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certain circumstances, pre- and post-shift clothes-changing falls outside the scope of "preliminary" or "postliminary" activities in Section 4(a)(2). 350 U.S. at 248; *see id.* at 254-56. This case does not involve the meaning or scope of those terms or of Section 4(a)(2). The question here turns on the meaning of Section 4(a)(1), which is plain. Indeed, in *Steiner*, the Court saw no ambiguity in the concept of "the principal activity or activities which such employee *is employed to perform*," *see supra* at 7 & n.3, and it expressly identified pre- and post-shift walking time as time not subject to mandatory compensation, *see* 350 U.S. at 256.

Nonetheless, respondents and the government suggest that Congress's response to *Anderson* was fully encompassed by Section 2 of the Portal Act—a provision that precludes mandatory compensation for "any activity of an employee engaged in prior to May 14, 1947," 29 U.S.C. § 252(a). See Resp. Br. 13-14, 34; U.S. Br. 3, 25 ("Congress fully addressed [the post-*Anderson*] emergency by enacting Section 2 of the Portal Act"). This attempt to divorce Section 4 from its historical origins is unsupportable. For example, Senator Cooper, on whom this Court relied in *Steiner*, made clear that in addition to addressing retroactive claims in Section 2, "[o]ur second decision was, that it was necessary to legislate as to the future. If we did not, the same conditions which prevail today would occur again, with all the resulting uncertainty, with all the resulting litigation." 93 Cong. Rec. 2287, 2293 (1947).

Senator Donnell, one of the Senate Managers involved with the Conference Report, echoed this understanding, observing that what became Section 4 addressed "claims with respect to which this vast uncertainty has arisen in our economy" after *Anderson*. 93 Cong. Rec. 2176, 2181 (1947). Thus, the government's suggestion that Congress "fully addressed [the *Anderson*] emergency by enacting Section 2 of the Portal Act," U.S. Br. 25, is irreconcilable with this legislative history.

Section 2, in removing "any activity" from mandatory compensation, went beyond the scope of *Anderson* and was designed to stop the immediate hemorrhaging of time and resources into existing litigation; Section 4 was a direct response to the over-breadth of *Anderson*. And, in direct reaction to *Anderson*, a primary purpose of Section 4 was to ensure pre- and post-shift walking time was not subject to mandatory compensation. As Senator Cooper stated with precision and without qualification:

> The committee decided, first, that we should make noncompensable, walking, riding or traveling to and

> from the actual place of performance of the principal activities which such employee is employed to perform. Then, clearly and definitely, *as to the future*, an employee *cannot receive compensation* for *any* walking, riding or traveling time to the actual place of performance where he begins his actual activities.

93 Cong. Rec. at 2297 (emphases added).

Respondents' only response is to assert that Senator Cooper also stated, elsewhere in the legislative history, that the "term principal activity or activities includes all activities which are an integral part thereof." Resp. Br. 38 (internal quotation marks omitted) (quoting *Steiner*, 350 U.S. at 257 (quoting legislative history)). Nothing in that general observation, however, detracts from the more specific and categorical prohibition of compensation for walking time to and from the actual place of performance. See Pet. Br. 23-26. Indeed, when the Senator addressed the precise integral and indispensable activity at issue here—clothes-changing—he stated only that "'the time used in changing into those clothes would be compensable as part of [the employee's] principal activity,'" *Steiner*, 350 U.S. at 258 (quoting legislative history). He did not address the compensability of related walking time, let alone contradict his categorical statement that an employee cannot receive compensation for "any walking . . . time to the actual place of performance where he begins his actual activities."[6] Senator Donnell's statements on the floor reinforce that categorical view, explaining:

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[6] Respondents also try to dismiss earlier comments that Senator Cooper made when he explained why the phrase "actual place of work" was too vague. Resp. Br. 38 n.21. Although the drafters did not adopt the Senator's proposed solution, their subsequent adoption of the far more precise phrase "actual place of performance of the principal activity or activities which such employee is employed to perform" shows that they *shared* his concern, and sought to ensure that walking to and from the place where the productive work takes place is not mandatorily compensable. *See* Pet. Br. 25-26.

> So as we look forward into the future an employee finds, first, that his activities in walking, riding, or traveling to and from the actual place of the performance of his principal activity—for instance, walking to the lathe which he operates, the walking taking place from the door of the plant up to the lathe—are not compensable. The employee is not entitled to compensation for any of those processes of walking, riding, or traveling

—unless, of course, they are subject to compensation by contract, custom, or practice. 93 Cong. Rec. at 2181 (statement of Sen. Donnell).

Respondents' reliance on the notion of the "workday" with respect to future claims also fails. See Resp. Br. 35-39; U.S. Br. 26 ("The only way in which Congress sought to cut back on existing law was by excluding from compensation preliminary or postliminary activities and walking that occur outside the workday."). The Senate Report explains that the use of the term "workday" in the context of the Portal Act has a specific meaning: "this report uses the term 'workday' to mean *that period of the workday* between the commencement by the employee, and the termination by the employee, of the principal activity or activities w*hich such employee was employed to perform*." S. Rep. No. 80-48, at 47 (1947) (emphases added). Thus, the term "workday," as used in the legislative history of the Portal Act, encompasses only those principal activities which an employee was employed to perform. See *id.*

In fact, an example from the legislative history that respondents cite highlights this point. See Resp. Br. 39. They refer to the case of a worker in a textile mill, who is required to report 30 minutes before other employees to distribute clothing to other employees and ready the machines for operation by other employees. The Senate Report concludes not that such activities are "integral" to the employee's principal activity (as it does when describing the

preparatory acts of a lathe worker) but that they "are among the principal activities of such employee." S. Rep. No. 80-48, at 48, *quoted in* 350 U.S. at 257. Thus, this textile mill employee is employed to perform two principal activities: preparing the factory and producing garments. Finding the walking time here noncompensable, by contrast, is fully consistent with that example. Respondents here are not employed for the purpose of changing clothes, but the garment worker was employed to ready the mill.

The other example in the report (a worker who cleaned a lathe) involved a situation in which the employee did not have to walk after this integral activity to the place where he performed the principal activity he was hired to perform. The employee was already at that place (his lathe). Thus, the example does not address the compensability of walking time that occurs between a compensable activity and the place where the employee performs the tasks he or she was "employed to perform."

D. Agency Interpretive Guidance Buttresses Petitioner's Reading Of Section 4(a)(1).

The agency's interpretive guidance further supports petitioner's plain reading of Section 4(a). Most apposite is 29 C.F.R. § 790.7(g) n.49, which expressly acknowledges that even if "the changing of clothes may in certain circumstances be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity,'" and therefore compensable:

> [t]his does not necessarily mean, however, that travel between the . . . clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

Id. (citing colloquy between Senators McGrath and Cooper). Like this Court's decision in *Steiner*—which also relied

extensively on colloquies between Senators McGrath and Cooper—the agency's explanation makes clear that a compensable "integral and indispensable" activity does not render compensable all time spent walking between that activity and the actual work station. See *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 280 (1st Cir. 2004) (relying on this provision to reach a result contrary to that of the court below), *cert. granted*, 125 S. Ct. 1295 (2005). The efforts of respondents and the government to dismiss footnote 49 are unavailing.

Although respondents and the government suggest that the footnote is ambiguous, Resp. Br. 26-27; U.S. Br. 23, footnote 49 makes unmistakably clear that a locker room is not "the actual place of performance" of the principal activity. 29 C.F.R. § 790.7(g) n.49. Immediately after stating that clothes-changing can be regarded as an "integral part of [an] employee's 'principal activity,'" the regulation states that "[t]his does not necessarily mean, however, that travel between the . . . clothes-changing place and *the actual place of performance of the specific work the employee is employed to perform*[] would be excluded from" Section 4(a)(1). *Id.* (emphasis added). The clear import of this sentence is that the "clothes-changing place" is *not* the "actual place of performance of the principal activity," and that clothes-changing is not the principal activity "the employee is employed to perform." The sentence is thus flatly inconsistent with respondents' claim that such walking is "'from the place of performance of one principal activity to the place of performance of another.'" Resp. Br. 26 (emphasis omitted) (quoting 29 C.F.R. § 790.7(c)).[7]

[7] Respondents and the government say that footnote 49 simply "reserve[s] the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act." U.S. Br. 23; Resp. Br. 27. But, under their view, there is no such possibility, and neither respondents nor the government identify how one could arise if, as they claim, any clothes-changing that is integral and

The government argues that footnote 49 cannot obscure what is clear, then cites its regulatory syllogism that (1) the Portal Act has no effect on walking that occurs during the workday, (2) the workday begins with the first principal activity and (3) integral and indispensable activities are themselves principal activities. U.S. Br. 24 (citing 29 C.F.R. §§ 790.6(a)-(b), 790.8(b)-(c)). In fact, this regulatory syllogism fails. Although Section 790.8 does deem integral and indispensable activities to be principal activities, it cites back to footnote 49 when applying this principle to clothes-changing. See 29 C.F.R. § 790.8(c) n.65. Thus, the very regulations the government cites for its syllogism acknowledge that walking time that comes between indispensable clothes-changing and the actual place where an employee performs the tasks for which he or she was hired is not necessarily compensable. The government's own regulations, therefore, are inconsistent with the categorical rule respondents and the government purport to derive from them. Indeed, as just noted, footnote 49 recognizes that the relevant "principal . . . activities" are those the employee "is employed to perform," and that clothes-changing does not fall within that category—a recognition reflected in other relevant regulations that further buttress petitioner's reading of Section 4(a)(1) by referring only to those places where employees perform the productive tasks for which they were hired as "the actual place of performance."[8]

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indispensable to a principal activity is itself a principal activity that triggers the start of the workday.

[8] *See* 29 C.F.R. § 790.7(c) (referring to "the actual place where he does *what he is employed to do*") (emphasis added); *id.* § 790.7(e) (referring to employee's "workbench or other place where he commences the performance of the principal activity or activities"); *id.* (referring to "telephone lineman, a 'trouble-shooter' in a manufacturing plant, a meter reader, or an exterminator" as employees who perform their "principal activity at various places"); *id.* § 790.7(f) (referring to "the employee's lathe, workbench or other actual place of performance of his principal activity or activities"); *id.* § 790.6(b) (referring to situation where an

Ultimately, respondents and the government try to brush aside footnote 49 by arguing that the Court owes deference to the implausible "interpretation" in the government's brief. U.S. Br. 24 (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997)). But, even assuming *Auer* remains good law,[9] the interpretation set forth in the government's brief is not entitled to deference. Unlike the situation in *Auer*, see 519 U.S. at 462, the government here is defending its own litigation position in other cases, see U.S. Br. 21 n.3, 24. More fundamentally, an agency's interpretation must yield if it "is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation omitted). Whatever ambiguity there may be in footnote 49, it unambiguously acknowledges (1) that a locker room in which integral and indispensable clothes-changing occurs is *not* "the actual place of performance of the specific work the employee is employed to perform," and (2) that walking time that follows such clothes-changing may *not* be compensable. 29 C.F.R. § 790.7(g) n.49. The government's categorical view that integral and indispensable clothes-changing (1) renders the locker room an employee's "actual place of performance of the principal activity or activities which such employee is employed to perform" and (2) necessarily renders all related walking time compensable simply cannot be reconciled with the regulatory text.

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employee reports to "the actual place of performance of his principal activity" but, due to circumstances beyond his control, "he is not able to commence performance of his productive activities until a later time"); *see also id.* § 790.8(a) ("The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform'; they do not include noncompensable 'walking, riding, or traveling' of the type referred to in section 4 of the Act.") (footnotes omitted).

[9] *See, e.g.*, *Keys* v. *Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (noting that there is "[p]robably . . . little left of *Auer*" after *Christensen* v. *Harris County*, 529 U.S. 576, 587-88 (2000), which declined to grant *Chevron* deference to a Department of Labor opinion letter).

Finally, respondents and the government cannot take solace in the notion of a "continuous workday" or any regulations touching on that subject. Resp. Br. 25-26; U.S. Br. 18-22. As aptly described in the Chamber's brief, although a workday may be "continuous, *once it begins*[,] [t]here is no rule that also establishes the converse proposition that [the employees] urge, that all compensable time must occur during the 'workday.'" Chamber Br. 6. Indeed, the government has long recognized exceptions to the putative continuous workday rule. For example, a 1941 opinion from the agency recognized that a miner's compensable workday began upon arrival at the mine collar even though he was compensated for various prepatory tasks prior to the workday beginning. See Barber Foods Br. 30-31. Likewise, U.S. Department of Labor Interpretive Bulletin 13 (1939), see U.S. Br. 18-19, "expressly contemplates compensation outside the bounds of the workday." Chamber Br. 6 n.3. Thus, compensated pre- and post-shift clothes-changing do not ineluctably mark the start and stop of the workday such that all related walking time is also compensable.

II. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 4(a)(1) LEADS TO ANOMALOUS RESULTS AND THE KIND OF HARMS THE PORTAL ACT WAS DESIGNED TO AVOID.

As petitioner previously demonstrated, the Ninth Circuit's reading of Section 4(a)(1) also should be rejected because it would recreate the very problems that prompted passage of the Portal Act in the first place and lead to anomalous results. See *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 202-03 (2000) (courts should avoid interpretations that "create anomalous results" in light of the "practical consequences"); Pet. Br. 32-37. Although respondents quibble with the way in which the Ninth Circuit's rule may play out in this case, nothing in respondents' brief undermines the First Circuit's core observation that an "automatic rule that any activity that satisfies the 'integral and indispensable'

test itself starts the workday" "would lead to . . . absurd result[s]," *Tum*, 360 F.3d at 280—both in the cases under review and more generally.

First, respondents deny that the compensability of walking time under their rule would depend on the "fortuity" of where compensable gear is located, see Pet. Br. 32-33, because employers could purposefully reconfigure their facilities to reduce compensable walking time to achieve "efficiencies," see Resp. Br. 44-47; see also U.S. Br. 26-27. Respondents miss petitioner's point. If the Ninth Circuit's approach becomes the law of the land, employers likely would seek to "reengineer" their facilities to minimize walking time because, as respondents concede, such liability is tied to "the building's design." Resp. Br. 47. In some and perhaps many circumstances, such reengineering might not be practical. But even where it is, such reengineering would be dictated by a misreading of the statute, not notions of industrial efficiency. Given that the walk from the factory gate to the work station must happen anyway, any changes with respect to what portion of that walk would be compensated would not bring greater "efficiency" to the pre- and post-shift process or any benefit to employees, who would still walk the same distance. Instead, respondents' approach would encourage decisions to be made by an artificial effort to avoid liability for walking time Congress never intended to make compensable. See *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003); *Tum*, 360 F.3d at 285 (Boudin, C.J., concurring) (same); cf. *Anderson*, 328 U.S. at 690 (recognizing the problem of fortuity).

Second, respondents' approach creates incongruous and disparate effects on workers who perform similar work, but pick up the first piece of compensable gear at different locations, thereby inviting inevitable workplace discontent. See Pet. Br. 33-34. Respondents contend that these discrepancies are irrelevant within the context of this litigation because they were awarded a flat measure of

walking time. Resp. Br. 49. In making their argument, however, respondents prove petitioner's point: the award below was made "regardless of the manner in which [employees] actually" carry out their pre-shift activities. *Id.* Put another way, the district court awarded a uniform amount of walking time precisely because "there are considerable differences in how and where each employee dons and doffs his or her equipment." Pet. App. 54a.[10]

Third, the Ninth Circuit's approach leads to unexpected and large liabilities by permitting relatively short pre- and post-shift clothes-changing time to trigger large periods of intervening and mandatorily compensable walking time. See *Tum*, 360 F.3d at 284 (noting compensable walking time was "especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal"); Pet. Br. 35-37. Neither respondents nor the government deny this result.[11]

[10] The government's related contention that the district court awarded payment of uniform walking time as a "*remedial* measure" because petitioner failed to maintain records, *see* U.S. Br. 29-30 (citing Pet. App. 47a), is incorrect. Although respondents were permitted to *prove* their case through "representative evidence," *see* Pet. App. 47a, as shown, the district court awarded a uniform amount of walking time because it recognized that awarding actual time was unworkable, *id.* at 54a. This acknowledges the very discrepancies petitioner has raised. Moreover, the district court's award is irreconcilable with the continuous workday rule respondents and the government also claim governs this case, *e.g.*, U.S. Br. 29-30, because it ignores certain time employees spend walking within what they assert (incorrectly) is the compensable workday, *see* Pet. Br. 38. In short, there is no need to estimate the amount of walking time if it occurs during the compensable workday.

[11] Respondents simply question how many of them might be affected by the illustrative example mentioned by petitioner, but concede that there are employees in the Pasco plant who wear relatively little compensable protective clothing. *See* Resp. Br. 47-48. The government relies on its workday refrain, arguing that the walking at issue here falls within the ambit of the compensable workday and arguing implausibly (and contrary to the record in this case) that "all travel within the workday has the

These anomalous results are highlighted not only within the factual setting of this case, but in the myriad circumstances in which the Portal Act intersects with a variety of American workplace settings. See Chamber Br. 1-3, 13-14, 19 & nn.19 & 20; National Chicken Council Br. 2, 8-9. If, as respondents and the government urge, any compensable preliminary activity triggers compensation for all subsequent walking or travel to the actual place of performance of the main activity the employee is hired to perform, employers nationwide would face significant and unexpected liabilities. See *id.*[12]

At bottom, mandatory compensation of the walking time at issue here is not warranted under the text, history, or purpose of the Portal Act. Such arrangements should be left to private contract, custom, or practice. Congress did not intend to open the floodgates to pre- and post-shift walking time compensation. If there is to be any expansion of mandatory "walking time" compensation, "the proper venue for resolving that issue remains the floor of Congress." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 (1998).

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment of the Ninth Circuit should be reversed.

potential to be long in relation to the time spent 'actually working' at the destination." U.S. Br. 27.

[12] Ignoring the remainder of the American economy, respondents contend that the Court's adoption of their rule would not surprise the "meatpacking industry," because it "has been aware of these issues for more than 15 years." Resp. Br. 50. This is facially absurd given that the Ninth Circuit's decision below marked the first time a circuit court had adopted respondents' constricted view of the Portal Act.

Respectfully submitted,

MICHAEL J. MUELLER
JOEL M. COHN
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Avenue,
NW
Washington, DC 20036
(202) 887-4000

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
REBECCA K. WOOD
NORINA IRANI EDELMAN
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

September 6, 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

IBP, INC. *v.* ALVAREZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1238. Argued October 3, 2005—Decided November 8, 2005*

After this Court ruled that the term "workweek" in the Fair Labor Standards Act of 1938 (FLSA) included the time employees spent walking from time clocks near a factory entrance to their workstations, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 691–692, Congress passed the Portal-to-Portal Act of 1947, which, *inter alia*, excepted from FLSA coverage walking on the employer's premises to and from the location of the employee's "principal activity or activities," §4(a)(1), and activities that are "preliminary or postliminary" to "said principal activity or activities," §4(a)(2). The Act did not otherwise change this Court's descriptions of "work" and "workweek" or define "workday." Regulations promulgated by the Secretary of Labor shortly thereafter concluded that the Act did not affect the computation of hours within a "workday," 29 CFR §790.6(a), which includes "the period between the commencement and completion" of the "principal activity or activities," §790.6(b). Eight years after the enactment of the Portal-to-Portal Act and these interpretative regulations, the Court explained that the "term 'principal activity or activities' . . . embraces all activities which are 'an integral and indispensable part of the principal activities,'" including the donning and doffing of specialized protective gear "before or after the regular work shift, on or off the production line." *Steiner* v. *Mitchell*, 350 U. S. 247, 256.

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*Together with No. 04–66, *Tum et al.* v. *Barber Foods, Inc., dba Barber Foods*, on certiorari to the United States Court of Appeals for the First Circuit.

Syllabus

In No. 03–1238, respondent employees filed a class action seeking compensation for time spent donning and doffing required protective gear and walking from the locker rooms to the production floor of a meat processing facility owned by petitioner IBP, Inc. (IBP), and back. The District Court found the activities compensable, and the Ninth Circuit affirmed. In No. 04–66, petitioner employees sought compensation for time spent donning and doffing required protective gear at a poultry processing plant operated by respondent Barber Foods, Inc. (Barber), as well as the attendant walking and waiting times. Barber prevailed on the walking and waiting claims. On appeal, the First Circuit found those times preliminary and postliminary activities excluded from FLSA coverage by §§4(a)(1) and (2) of the Portal-to-Portal Act.

Held:

1. The time respondents in No. 03–1238 spend walking between changing and production areas is compensable under the FLSA. Pp. 7–15.

(a) Section 4(a)(1)'s text does not exclude such time from the FLSA's scope. IBP claims that, because donning is not the "principal activity" that starts the workday, walking occurring immediately after donning and immediately before doffing is not compensable. That argument, which in effect asks for a third category of activities—those that are "integral and indispensable" to a "principal activity" and thus not excluded from coverage by §4(a)(2), but are not themselves "principal activities" as defined by §4(a)(1)—is foreclosed by *Steiner*, which made clear that §4 does not remove activities that are "integral and indispensable" to "principal activities" from FLSA coverage precisely because such activities are themselves "principal activities." 350 U. S., at 253. There is no plausible argument that these terms mean different things in §4(a)(2) and in §4(a)(1). Under the normal rule of statutory interpretation, identical words used in different parts of the same statute are generally presumed to have the same meaning; and in §4(a)(2)'s reference to "said principal activity or activities," "said" is an explicit reference to the use of the identical term in §4(a)(1). Pp. 10–12.

(b) Also unpersuasive is IBP's argument that Congress' repudiation of the *Anderson* holding reflects a purpose to exclude the walking time at issue. That time, which occurs after the workday begins and before it ends, is more comparable to time spent walking between two different positions on an assembly line than to the walking in *Anderson*, which occurred before the workday began. Pp. 12–13.

(c) The relevant regulations also support this view of walking. Contrary to IBP's claim, 29 CFR §790.6 does not strictly define the workday's limits as the period from "whistle to whistle." And

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§790.7(g), n. 49, which provides that postdonning walking time is not "necessarily" excluded from §4(a)(1)'s scope, does not mean that such time is always excluded and is insufficient to overcome clear statements in the regulations' text that support the holding here. Pp. 13–15.

2. Because donning and doffing gear that is "integral and indispensable" to employees' work is a "principal activity" under the statute, the continuous workday rule mandates that the time the No. 04–66 petitioners spend walking to and from the production floor after donning and before doffing, as well as the time spent waiting to doff, are not affected by the Portal-to-Portal Act, and are instead covered by the FLSA. Pp. 15–17.

3. However, §4(a)(2) excludes from the FLSA's scope the time employees spend waiting to don the first piece of gear that marks the beginning of the continuous workday. Such waiting—which is two steps removed from the productive activity on the assembly line—comfortably qualifies as a "preliminary" activity. The fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are "integral and indispensable" to a "principal activity" under *Steiner*. No limiting principle allows this Court to conclude that the waiting time here is such an activity without also leading to the logical (but untenable) conclusion that the walking time in *Anderson* would also be a "principal activity" unaffected by the Portal-to-Portal Act. Title 29 CFR §790.7(h) does not support a contrary view. Pp. 17–19.

No. 03–1238, 339 F. 3d 894, affirmed; No. 04–66, 360 F. 3d 274, affirmed in part, reversed in part, and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 03–1238 and 04–66

IBP, INC., PETITIONER

03–1238 *v.*

GABRIEL ALVAREZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ABDELA TUM, ET AL., PETITIONERS

04–66 *v.*

BARBER FOODS, INC., DBA BARBER FOODS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[November 8, 2005]

JUSTICE STEVENS delivered the opinion of the Court.

These consolidated cases raise questions concerning the coverage of the Fair Labor Standards Act of 1938 (FLSA), as amended by the Portal-to-Portal Act of 1947, with respect to activities of employees who must don protective clothing on the employer's premises before they engage in the productive labor for which they are primarily hired. The principal question, which is presented in both cases, is whether the time employees spend walking between the changing area and the production area is compensable under the FLSA.* The second question, which is presented only in No. 04–66, is whether the time employees spend waiting to put on the protective gear is compensable under the statute. In No. 03–1238, the Court of Appeals for the

Ninth Circuit answered "yes" to the first question, 339 F. 3d 894 (2003); in No. 04–66, the Court of Appeals for the First Circuit answered "no" to both questions, 360 F. 3d 274, 281 (2004). We granted certiorari to resolve the conflict. 543 U. S. ___ (2005).

I

As enacted in 1938, the FLSA, 29 U. S. C. §201 *et seq.*, required employers engaged in the production of goods for commerce to pay their employees a minimum wage of "not less than 25 cents an hour," §6(a)(1), 52 Stat. 1062, and prohibited the employment of any person for workweeks in excess of 40 hours after the second year following the legislation "unless such employee receives compensation for his employment in excess of [40] hours . . . at a rate not less than one and one-half times the regular rate at which he is employed," *id.*, §7(a)(3), at 1063. Neither "work" nor "workweek" is defined in the statute.[1]

Our early cases defined those terms broadly. In *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590 (1944), we held that time spent traveling from iron ore mine portals to underground working areas was compensable; relying on the remedial purposes of the statute and Webster's Dictionary, we described "work or employment" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.*, at 598; see *id.*, at 598, n. 11. The same year, in *Armour & Co.* v. *Wantock*, 323 U. S. 126 (1944), we clarified that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA. We pointed out that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for some-

[1]The most pertinent definition provides: " 'Employ' includes to suffer or permit to work." 52 Stat. 1060, 29 U. S. C. §203(g).

thing to happen." *Id.*, at 133. Two years later, in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946), we defined "the statutory workweek" to "include all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.*, at 690–691. Accordingly, we held that the time necessarily spent by employees walking from time clocks near the factory entrance gate to their workstations must be treated as part of the workweek. *Id.*, at 691–692.

The year after our decision in *Anderson*, Congress passed the Portal-to-Portal Act, amending certain provisions of the FLSA. Based on findings that judicial interpretations of the FLSA had superseded "long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation," 61 Stat. 84, it responded with two statutory remedies, the first relating to "existing claims," *id.*, at 85–86, and the second to "future claims," *id.*, at 87–88. Both remedies distinguish between working time that is compensable pursuant to contract or custom and practice, on the one hand, and time that was found compensable under this Court's expansive reading of the FLSA, on the other. Like the original FLSA, however, the Portal-to-Portal Act omits any definition of the term "work."

With respect to existing claims, the Portal-to-Portal Act provided that employers would not incur liability on account of their failure to pay minimum wages or overtime compensation for any activity that was not compensable by either an express contract or an established custom or practice.[2] With respect to "future claims," the Act pre-

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[2]Part II of the Portal-to-Portal Act, entitled "EXISTING CLAIMS," states in relevant part:

"SEC. 2. Relief From Certain Existing Claims Under the Fair Labor Standards Act of 1938 . . . —

"(a) No employer shall be subject to any liability or punishment

served potential liability for working time not made compensable by contract or custom but narrowed the coverage of the FLSA by excepting two activities that had been treated as compensable under our cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are "preliminary or postliminary" to that principal activity.

Specifically, Part III of the Portal-to-Portal Act, entitled "FUTURE CLAIMS," provides in relevant part:

> "SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938 . . . —
>
> "(a) Except as provided in subsection (b) [which covers work compensable by contract or custom], no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee en-

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under the Fair Labor Standards Act . . . (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer." 61 Stat. 85 (codified at 29 U. S. C. §252(a)).

gaged in on or after the date of the enactment of this Act—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 61 Stat. 86–87 (codified at 29 U. S. C. §254(a)).

Other than its express exceptions for travel to and from the location of the employee's "principal activity," and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms "work" and "workweek," or to define the term "workday." A regulation promulgated by the Secretary of Labor shortly after its enactment concluded that the statute had no effect on the computation of hours that are worked "within" the workday. That regulation states: "[T]o the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of [§4] have no application" 29 CFR §790.6(a) (2005).[3] Similarly, consistent with

[3]The regulation provides in full:

"Section 1 of the Portal Act does not affect the computation of hours worked within the 'workday' proper, roughly described as the period 'from whistle to whistle,' and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before 'prelimi-

our prior decisions interpreting the FLSA, the Department of Labor has adopted the continuous workday rule, which means that the "workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." §790.6(b). These regulations have remained in effect since 1947, see 12 Fed. Reg. 7658 (1947), and no party disputes the validity of the continuous workday rule.

In 1955, eight years after the enactment of the Portal-to-Portal Act and the promulgation of these interpretive regulations, we were confronted with the question whether workers in a battery plant had a statutory right to compensation for the "time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide. . . ." *Steiner* v. *Mitchell*, 350 U. S. 247, 248 (1956). After distinguishing

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nary' or 'postliminary' activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the 'workday' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the 'workday' in activities of the kind described in section 4." §790.6(a) (footnotes omitted).

"changing clothes and showering under normal conditions" and stressing the important health and safety risks associated with the production of batteries, *id.*, at 249, the Court endorsed the Court of Appeals' conclusion that these activities were compensable under the FLSA.

In reaching this result, we specifically agreed with the Court of Appeals that "the term 'principal activity or activities' in Section 4 [of the Portal-to-Portal Act] embraces all activities which are an 'integral and indispensable part of the principal activities,' and that the activities in question fall within this category." *Id.*, at 252–253. Thus, under *Steiner*, activities, such as the donning and doffing of specialized protective gear, that are "performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Id.*, at 256.

The principal question presented by these consolidated cases—both of which involve required protective gear that the courts below found integral and indispensable to the employees' work—is whether postdonning and predoffing walking time is specifically excluded by §4(a)(1). We conclude that it is not.

II

Petitioner in No. 03–1238, IBP, Inc. (IBP), is a large producer of fresh beef, pork, and related products. At its plant in Pasco, Washington, it employs approximately 178 workers in 113 job classifications in the slaughter division and 800 line workers in 145 job classifications in the processing division. All production workers in both divisions must wear outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots. Many of them, particularly those who use knives, must

also wear a variety of protective equipment for their hands, arms, torsos, and legs; this gear includes chain link metal aprons, vests, plexiglass armguards, and special gloves. IBP requires its employees to store their equipment and tools in company locker rooms, where most of them don their protective gear.

Production workers' pay is based on the time spent cutting and bagging meat. Pay begins with the first piece of meat and ends with the last piece of meat. Since 1998, however, IBP has also paid for four minutes of clothes-changing time.[4] In 1999, respondents, IBP employees, filed this class action to recover compensation for preproduction and postproduction work, including the time spent donning and doffing protective gear and walking between the locker rooms and the production floor before and after their assigned shifts.

After a lengthy bench trial, the District Court for the Eastern District of Washington held that donning and doffing of protective gear that was unique to the jobs at issue were compensable under the FLSA because they were integral and indispensable to the work of the employees who wore such equipment. Moreover, consistent with the continuous workday rule, the District Court concluded that, for those employees required to don and doff unique protective gear, the walking time between the locker room and the production floor was also compensable because it occurs during the workday.[5] The court did not,

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[4]IBP does not contend that this clothes-changing time fully compensated respondents for the preproduction and postproduction time at issue in this case.

[5]The District Court explained:

"Walking time is compensable if it occurs after the start of the workday. 29 U. S. C. §254(a). Walking time is excluded under the Portal to Portal Act only if it occurs 'either prior to the time on any particular work day at which such employee commences or subsequent to the time on any particular work day at which he ceases such principal activity or activities.' *Id.* The work day begins with the commencement of an

however, allow any recovery for ordinary clothes changing and washing, or for the "donning and doffing of hard hat[s], ear plugs, safety glasses, boots [or] hairnet[s]." App. to Pet. for Cert. in No. 03–1238, p. 65a.

The District Court proceeded to apply these legal conclusions in making detailed factual findings with regard to the different groups of employees. For example, the District Court found that, under its view of what was covered by the FLSA, processing division knife users were entitled to compensation for between 12 and 14 minutes of preproduction and postproduction work, including 3.3 to 4.4 minutes of walking time.

The Court of Appeals agreed with the District Court's ultimate conclusions on these issues, but in part for different reasons. 339 F. 3d 894 (CA9 2003). After noting that the question whether activities "'are an integral and indispensable part of the principal activities'" within the meaning of *Steiner*, is "context specific," 339 F. 3d, at 902, the Court of Appeals endorsed the distinction between the burdensome donning and doffing of elaborate protective gear, on the one hand, and the time spent donning and doffing nonunique gear such as hardhats and safety goggles, on the other. It did so not because donning and doffing nonunique gear are categorically excluded from being "principal activities" as defined by the Portal-to-Portal Act, but rather because, in the context of this case, the time employees spent donning and doffing nonunique protective gear was "'*de minimis* as a matter of law.'" *Id.*, at 904.

IBP does not challenge the holding below that, in light of *Steiner*, the donning and doffing of unique protective gear are "principal activities" under §4 of the Portal-to-

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employer's principal activity or activities and ends with the completion of the employee's activity. . . ." App. to Pet. for Cert. in No. 03–1238, pp. 53a–54a.

Portal Act. Moreover, IBP has not asked us to overrule *Steiner*. Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades. Thus, the only question for us to decide is whether the Court of Appeals correctly rejected IBP's contention that the walking between the locker rooms and the production areas is excluded from FLSA coverage by §4(a)(1) of the Portal-to-Portal Act.

IBP argues that the text of §4(a)(1), the history and purpose of its enactment, and the Department of Labor's interpretive guidance compel the conclusion that the Portal-to-Portal Act excludes this walking time from the scope of the FLSA. We find each of these arguments unpersuasive.

Text

IBP correctly points out that our decision in *Steiner* held only that the donning and doffing of protective gear in that case were activities "integral and indispensable" to the workers' principal activity of making batteries. 350 U. S., at 256. In IBP's view, a category of "integral and indispensable" activities that may be compensable because they are not merely preliminary or postliminary within the meaning of §4(a)(2) is not necessarily coextensive with the actual "principal activities" which the employee "is employed to perform" within the meaning of §4(a)(1). In other words, IBP argues that, even though the court below concluded that donning and doffing of unique protective gear are "integral and indispensable" to the employees' principal activity, this means only that the donning and doffing of such gear are themselves covered by the FLSA. According to IBP, the donning is *not* a "principal activity" that starts the workday, and the walking that occurs immediately after donning and immediately before doffing

is not compensable. In effect, IBP asks us to create a third category of activities—those that are "integral and indispensable" to a "principal activity" and thus not excluded from coverage by §4(a)(2), but that are not themselves "principal activities" as that term is defined by §4(a)(1).

IBP's submission is foreclosed by *Steiner*. As noted above, in *Steiner*, we made it clear that §4 of the Portal-to-Portal Act does not remove activities which are "'integral and indispensable'" to "'principal activities'" from FLSA coverage precisely because such activities are themselves "principal activities." *Id.*, at 253. While *Steiner* specifically addressed the proper interpretation of the term "principal activity or activities" in §4(a)(2), there is no plausible argument that these terms mean something different in §4(a)(2) than they do in §4(a)(1).[6] This is not only because of the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning. *E.g.*, *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990). It is also because §4(a)(2) refers to "*said* principal activity or activities." 61 Stat. 87 (emphasis added). The "said" is an explicit reference to the use of the identical term in §4(a)(1).

Indeed, IBP has not offered any support for the unlikely proposition that Congress intended to create an intermediate category of activities that would be sufficiently "principal" to be compensable, but not sufficiently principal to commence the workday. Accepting the necessary import of our holding in *Steiner*, we conclude that the locker rooms where the special safety gear is donned and doffed are the relevant "place of performance" of the prin-

[6] In fact, as noted above, in *Steiner* we specifically endorsed the view of the Court of Appeals that the definition of "principal activity or activities" in §4 encompassed activities "'integral and indispensable'" to those principal activities. We did not make any distinction between §4(a)(1) and §4(a)(2). 350 U. S., at 253.

cipal activity that the employee was employed to perform within the meaning of §4(a)(1). Walking to that place before starting work is excluded from FLSA coverage, but the statutory text does not exclude walking from that place to another area within the plant immediately after the workday has commenced.

Purpose

IBP emphasizes that our decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, may well have been the proximate cause of the enactment of the Portal-to-Portal Act. In that case we held that the FLSA mandated compensation for the time that employees spent walking from time clocks located near the plant entrance to their respective places of work prior to the start of their productive labor. *Id.*, at 690–691. In IBP's view, Congress' forceful repudiation of that holding reflects a purpose to exclude what IBP regards as the quite similar walking time spent by respondents before and after their work slaughtering cattle and processing meat. Even if there is ambiguity in the statute, we should construe it to effectuate that important purpose.

This argument is also unpersuasive. There is a critical difference between the walking at issue in *Anderson* and the walking at issue in this case. In *Anderson* the walking preceded the employees' principal activity; it occurred before the workday began. The relevant walking in this case occurs after the workday begins and before it ends. Only if we were to endorse IBP's novel submission that an activity can be sufficiently "principal" to be compensable, but not sufficiently so to start the workday, would this case be comparable to *Anderson*.

Moreover, there is a significant difference between the open-ended and potentially expansive liability that might result from a rule that treated travel before the workday begins as compensable, and the rule at issue in this case.

Indeed, for processing division knife users, the largest segment of the work force at IBP's plant, the walking time in dispute here consumes less time than the donning and doffing activities that precede or follow it. It is more comparable to time spent walking between two different positions on an assembly line than to the prework walking in *Anderson*.

Regulations

The regulations adopted by the Secretary of Labor in 1947 support respondents' view that when donning and doffing of protective gear are compensable activities, they may also define the outer limits of the workday. Under those regulations, the few minutes spent walking between the locker rooms and the production area are similar to the time spent walking between two different workplaces on the disassembly line. See 29 CFR §790.7(c) (2005) (explaining that the Portal-to-Portal Act does not affect the compensability of time spent traveling from the place of performance of one principal activity to that of another). See also §785.38 (explaining, in a later regulation interpreting the FLSA, that "[w]here an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked . . ").

IBP argues, however, that two provisions in the regulations point to a different conclusion—the use of the phrase "whistle to whistle" in discussing the limits of the "workday," §790.6, and a footnote stating that postchanging walking time is not "necessarily" excluded from the scope of §4(a)(1). §790.7(g), n. 49.

The "whistle to whistle" reference does reflect the view that in most situations the workday will be defined by the beginning and ending of the primary productive activity.

But the relevant text describes the workday as "*roughly* the period 'from whistle to whistle.'" §790.6(a) (emphasis added). Indeed, the next subsection of this same regulation states: " 'Workday' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities." §790.6(b). IBP's emphasis on the "whistle to whistle" reference is unavailing.

The footnote on which IBP relies states:

> "Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.' This *does not necessarily mean*, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers." §790.7(g), n. 49 (emphasis added; citations omitted).

This footnote does indicate that the Secretary assumed that there would be some cases in which walking between a locker room where the employee performs her first principal activity and the production line would be covered by the FLSA and some cases in which it would not be. That assumption is, of course, inconsistent with IBP's submission that such walking is *always* excluded by §4(a), just as it is inconsistent with respondents' view that such walking is *never* excluded. Whatever the correct explanation for the Secretary's ambiguous (and apparently ambivalent) statement may be, it is not sufficient to overcome the clear statements in the text of the regulations that support our holding. And it surely is not sufficient to overcome the statute itself, whose meaning is definitively resolved by *Steiner*.

For the foregoing reasons, we hold that any activity that is "integral and indispensable" to a "principal activity" is itself a "principal activity" under §4(a) of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA.

III

Respondent in No. 04–66, Barber Foods, Inc. (Barber), operates a poultry processing plant in Portland, Maine, that employs about 300 production workers. These employees operate six production lines and perform a variety of tasks that require different combinations of protective clothing. They are paid by the hour from the time they punch in to computerized time clocks located at the entrances to the production floor.

Petitioners are Barber employees and former employees who brought this action to recover compensation for alleged unrecorded work covered by the FLSA. Specifically, they claimed that Barber's failure to compensate them for (a) donning and doffing required protective gear and (b) the attendant walking and waiting violated the statute.

After extensive discovery, the Magistrate Judge issued a comprehensive opinion analyzing the facts in detail, and recommending the entry of partial summary judgment in favor of Barber. That opinion, which was later adopted by the District Court for Maine, included two critical rulings.

First, the Magistrate held that "the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work [and therefore are] not excluded from compensation under the

Portal-to-Portal Act as preliminary or postliminary activities." App. to Pet. for Cert. in 04–66, pp. 36a–40a.

Second, the Magistrate rejected petitioners' claims for "compensation for the time spent before obtaining their clothing and equipment." *Id.*, at 33a. Such time, in the Magistrate's view, "could [not] reasonably be construed to be an integral part of employees' work activities any more than walking to the cage from which hairnets and earplugs are dispensed . . . ." *Ibid.* Accordingly, Barber was "entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out for such clothing or equipment." *Id.*, at 33a–34a.

The Magistrate Judge's opinion did not specifically address the question whether the walking time between the production line and the place of donning and doffing was encompassed by §4 of the Portal-to-Portal Act, and thus excluded from coverage under the FLSA. Whatever the intended scope of the Magistrate's grant of partial summary judgment, the questions submitted to the jury after trial asked jurors to consider only whether Barber was required to compensate petitioners for the time they spent actually donning and doffing various gear.

Before the case was submitted to the jury, the parties stipulated that four categories of workers—rotating, setup, meatroom, and shipping and receiving associates—were required to don protective gear at the beginning of their shifts and were required to doff this gear at the end of their shifts. The jury then made factual findings with regard to the amount of time reasonably required for each category of employees to don and doff such items; the jury concluded that such time was *de minimis* and therefore not compensable. The jury further concluded that two

other categories of employees—maintenance and sanitation associates—were not required to don protective gear before starting their shifts.[7] Accordingly, the jury ruled for Barber on all counts.

On appeal, petitioners argued, among other things, that the District Court had improperly excluded as noncompensable the time employees spend walking to the production floor after donning required safety gear and the time they spend walking from the production floor to the area where they doff such gear. The Court of Appeals rejected petitioners' argument, concluding that such walking time was a species of preliminary and postliminary activity excluded from FLSA coverage by §§4(a)(1) and (2) of the Portal-to-Portal Act. 360 F. 3d, at 281. As we have explained in our discussion of IBP's submission, see Part II, *supra*, that categorical conclusion was incorrect.

Petitioners also argued in the Court of Appeals that the waiting time associated with the donning and doffing of clothes was compensable. The Court of Appeals disagreed, holding that the waiting time qualified as a "preliminary or postliminary activity" and thus was excluded from FLSA coverage by the Portal-to-Portal Act. 360 F. 3d, at 282. Our analysis in Part II, *supra*, demonstrates that the Court of Appeals was incorrect with regard to the predoffing waiting time. Because doffing gear that is "integral and indispensable" to employees' work is a "principal activity" under the statute, the continuous workday rule mandates that time spent waiting to doff is not affected by the Portal-to-Portal Act and is instead covered by the FLSA.

The time spent waiting to don—time that elapses *before* the principal activity of donning integral and indispensable gear—presents the quite different question whether it should have the effect of advancing the time when the

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[7] The claims brought by these workers are no longer part of this case.

workday begins. Barber argues that such predonning waiting time is explicitly covered by §4(a)(2) of the Portal-to-Portal Act, which, as noted above, excludes "activities which are preliminary to or postliminary to [a] principal activity or activities" from the scope of the FLSA. 29 U. S. C. §254(a)(2).

By contrast, petitioners, supported by the United States as *amicus curiae*, maintain that the predonning waiting time is "integral and indispensable" to the "principal activity" of donning, and is therefore itself a principal activity. However, unlike the donning of certain types of protective gear, which is *always* essential if the worker is to do his job, the waiting may or may not be necessary in particular situations or for every employee. It is certainly not "integral and indispensable" in the same sense that the donning is. It does, however, always comfortably qualify as a "preliminary" activity.

We thus do not agree with petitioners that the predonning waiting time at issue in this case is a "principal activity" under §4(a).[8] As Barber points out, the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are "integral and indispensable" to a "principal activity" under *Steiner*. For example, walking from a time clock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate *Anderson*'s holding that such walking time was compensable under the FLSA. We discern no limiting principle that would allow us to conclude that the waiting time in dispute here is a "principal activity" under §4(a), without also leading to the logical

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[8]As explained below, our analysis would be different if Barber required its employees to arrive at a particular time in order to begin waiting.

(but untenable) conclusion that the walking time at issue in *Anderson* would be a "principal activity" under §4(a) and would thus be unaffected by the Portal-to-Portal Act.

The Government also relies on a regulation promulgated by the Secretary of Labor as supporting petitioners' view. That regulation, 29 CFR §790.7(h) (2005), states that when an employee "is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities." That regulation would be applicable if Barber required its workers to report to the changing area at a specific time only to find that no protective gear was available until after some time had elapsed, but there is no such evidence in the record in this case.

More pertinent, we believe, is the portion of §790.7 that characterizes the time that employees must spend waiting to check in or waiting to receive their paychecks as generally a "preliminary" activity covered by the Portal-to-Portal Act. See §790.7(g). That regulation is fully consistent with the statutory provisions that allow the compensability of such collateral activities to depend on either the agreement of the parties or the custom and practice in the particular industry.

In short, we are not persuaded that such waiting—which in this case is two steps removed from the productive activity on the assembly line—is "integral and indispensable" to a "principal activity" that identifies the time when the continuous workday begins. Accordingly, we hold that §4(a)(2) excludes from the scope of the FLSA the time employees spend waiting to don the first piece of gear that marks the beginning of the continuous workday.

IV

For the reasons stated above, we affirm the judgment of the Court of Appeals for the Ninth Circuit in No. 03–1238. We affirm in part and reverse in part the judgment of the Court of Appeals for the First Circuit in No. 04–66, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.